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NO. PD-0053-17

THE STATE OF TEXAS,

Appellant,

v.

DANIEL VILLEGAS,

Appellee.

Appealed from the 409th Judicial District Court
And the Court of Appeals for the Eighth District of Texas
El Paso, Texas

CORRECTED BRIEF OF APPELLEE DANIEL VILLEGAS

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STATEMENT OF THE CASE

In a transparent attempt to prejudice this Court, Appellant's five-page Statement of the Case is argumentative and focuses on contentions irrelevant to this appeal, in violation of the Texas Rules of Appellate Procedure. (Appellant's brief in support of p.d.r. [herein, "A'nt brf."] pp. xi-xv). The statement of the case "must state concisely the nature of the case ... the course of proceedings, and the trial court's disposition of the case[;]" "should seldom exceed one-half page, and should not discuss the facts." TEX.R.APP.P. 38.1(d); *see also* TEX.R.APP.P. 70.3 ("Briefs must comply with the requirements of Rules 9 and 38[.]") Appellee objects to Appellant's Statement of the Case, but must respond to its argumentative allegations.[1] *See* TEX.R.APP.P. 38.2(a)(1)(B) ("the appellee's brief need not include a statement of the case ... unless the appellee is dissatisfied with that portion of the appellant's brief[.]").

Daniel Villegas is accused of murdering two young men in 1993, when he was sixteen years old. (1CR:5-6 [indictment]; 16CR:5828 [age]). He was tried in 1994 for the crime, resulting in a mistrial. (1CR:95). When he and his family could not

[1] This is particularly true because Appellant has repeatedly argued, in the court below and in this Court, that Villegas must agree with its statements when he does not object – even if those are mere sidebar statements irrelevant to the issues then before the court. *See, e.g.*, A'nt brf., p. 30 n. 25. To avoid any future claim that he agrees with anything stated in Appellant's brief, Villegas denies every factual, procedural and legal assertion in that brief which is not expressly adopted herein.

continue to afford paying his counsel, the court appointed a new attorney to represent him – even though the retained counsel offered to continue serving as appointed counsel. (19CR:6760). The new attorney had only about 60 days to prepare for the trial of the double murder prosecution. (18CR:6262). By his own admission, he overlooked or did not utilize substantial amounts of "vital, material, and relevant" evidence, missed several key issues, and did not prepare or have time to prepare as the case required. (18CR:6262-65). At the second trial, Villegas was convicted and sentenced to serve the rest of his life in prison. (10CR:3414). Eighteen years later, he was granted habeas corpus relief based on ineffective assistance of counsel. *Ex parte Villegas*, 415 S.W.3d 885 (Tex.Crim.App. 2013).

Appellant's statement of the case refers to the trial court's finding that the State made numerous and inexcusable mistakes and omissions, then claims that this finding is "unsubstantiated." (A'nt brf. p. xii & n. 2). In fact, the finding is well-substantiated by the record. By way of summary, the State's numerous and inexcusable mistakes and omissions include:

- The State "investigated" the crime by threatening and intimidating teenaged witnesses until they gave false confessions, including the false confession of one who was undisputedly innocent, false confessions of two other purported accomplices who were not charged due to insufficient evidence, and the near-confession of one of the surviving victims. (See Statement of Facts, §§ D, F).

- The State was permitted to take David Rangel into custody and interrogate him after making false representations to his mother about the nature of their investigation. Rangel, under pressure and intimidation, repeated Daniel Villegas's joking statement to him that he was responsible for the crime. He told the State that Villegas was joking, but the State threw away his first statement because it contained a significant detail that was inconsistent with the facts of the crime, and ordered Rangel to sign a false statement without that detail. (See Statement of Facts, § D.3).

- Upon taking Villegas into custody, the State refused to take him to a designated juvenile processing office before stopping elsewhere, as required by Texas law. (See Statement of Facts, § E).

- The State extracted a false confession from Villegas by intimidation and threats of violence. Before taking Villegas before a magistrate, the State threatened him with violence if he did not tell the magistrate he was going to confess. (See Statement of Facts, § E).

- The State crumpled up and threw away Villegas's first statement. (See Statement of Facts, § E).

- While coercing Villegas's false confession, the detectives also collaborated to make another teenager who was simultaneously being interrogated provide a false statement consistent with Villegas's coerced confession. (See Statement of Facts, § F).

- After the first trial of Villegas, a private investigator notified the district attorney that he had secured a taped interview of witnesses providing exculpatory information. The State took this tape from the investigator and lost or destroyed it. (See Statement of Facts, § J).

- At the second trial of Villegas, the State persuaded his newly-appointed counsel to enter an incorrect factual stipulation, despite the fact that the proceedings from the first trial demonstrate that the State knew that stipulation to be false, then relied on that false stipulation to argue Villegas's intent to the jury in the second trial. (See Statement of Facts, § K).

- During the habeas corpus proceedings, the State provided the court with a demonstrably false affidavit to attempt to avoid habeas corpus relief. (See Statement of Facts, § M).

- During the habeas corpus proceedings, the State secured an affidavit from an alternative perpetrator after limiting his access to his attorney, taking him from the jail to meet with him at its office, and promising him the affidavit would not be used or would be withdrawn if he desired to exercise his Fifth Amendment privilege. When the perpetrator did plead the Fifth Amendment at the hearing, the State refused to withdraw the affidavit, effectively providing its version of the alternative perpetrator's story while denying Villegas the ability to cross-examine him. (See Statement of Facts, § M).

- During the habeas corpus proceedings, the State obtained a recording of a jail conversation, and falsely claimed that Villegas stated in that recording that he was "not innocent." Villegas did not make that statement. Nonetheless, the State persists in claiming in this appeal that he did so. (See Statement of Facts, § M; A'nt brf. pp. 6, 7, 45, 46).

Clearly, Appellant's claim that the trial court's recognition of its mistakes and omissions is "unsubstantiated" is inconsistent with the record.

Offended by the trial judge's recognition of its own misconduct, Appellant blamed the messenger, moving to recuse the trial judge on the basis of his findings based on the evidence. (21CR:7400). Because it is well-established that recusal does not lie for findings and opinions developed while presiding over a case,[2] Appellant's frivolous recusal motion was denied. (21CR:7501). Its second desperate motion to recuse the same judge was also denied. (22CR:7763, 7788).

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[2] *Gaal v. State*, 332 S.W.3d 448, 454 (Tex.Crim.App. 2011).

In advance of the third trial, Appellant produced approximately 1400 hours of recorded conversations between Villegas and others while he was in custody. (3RR:5-6). The trial court asked Appellant to confer with Villegas's counsel about which recordings were relevant, and to determine whether there was a disagreement about their contents. (3RR:6-7). Appellant's counsel stated that all of the hundreds of hours of recordings it had produced were relevant. (3RR:7).

Recognizing the futility of attempting to listen to hundreds of hours of audio recordings outside of the jury's presence during trial to determine their admissibility, the trial court instructed Appellant to identify the particular recordings it wished to offer at trial, and conducted a pretrial hearing on their admissibility. (21CR:7559; 9RR:1-98). This appeal arises from the trial court's order excluding 37 of these recordings because they are irrelevant; because any possible relevance is outweighed by the other considerations of Rule 403; and because they are hearsay. (22CR:7842).

The State's notice of appeal recites that "The State certifies that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case." (22CR:7843). However, it does not include any such certification by the elected prosecutor personally, as opposed to on behalf of the State. (22CR:7842-44; see Appendix 3).

The Court of Appeals denied Villegas's motion to dismiss this appeal for want of jurisdiction. *State v. Villegas*, 460 S.W.3d 168 (Tex.App.–El Paso 2015, order). Finding that the trial court did not abuse its discretion in the exclusionary order at issue, the Court of Appeals affirmed. *State v. Villegas*, 506 S.W.3d 717 (Tex.App.–El Paso 2017, pet. granted).

This Court granted discretionary review. The Court should not allow Appellant's argumentative Statement of the Case to prejudice it in reviewing the grounds presented.

ISSUES PRESENTED

I. There is no appellate jurisdiction, because the elected prosecuting attorney did not personally certify to the matters which he is required to personally certify in an appeal by the State.

II. Appellant's first ground for review argues, in part, that the trial court erred in excluding evidence at a pretrial hearing based on Rules of Evidence 402 (relevance), 403 (balancing relevance against other concerns), or 802 (hearsay).

A. This complaint was not preserved in the trial court.

B. The decision to conduct a pretrial hearing is not an appealable order.

C. Appellant's argument that the trial court erred in excluding evidence on the basis of hearsay at a pretrial hearing was not preserved for this Court's review in the Court of Appeals.

D. The trial court did not abuse its discretion in ruling on admissibility of evidence in a pretrial hearing.

III. Appellant's first ground for review argues, in part, that the trial court erred in placing a burden of proof on the State at a pretrial hearing.

A. This complaint was also not preserved in the trial court.

B. The record does not reflect that any burden of proof was placed on the State.

C. Even if the trial court placed a burden of proof on the State, it did not err in doing so.

1. In a motion to exclude evidence based on Rules of Evidence, rather than constitutional or statutory violations, the burden is the same as it would be at trial.

2. Even if the initial burden was on Villegas, he satisfied that burden by presenting the recordings to the trial court; the parties agree the recordings were constructively admitted.

IV. Appellant's second ground for review argues that the Court of Appeals misapplied the standard of review for exclusion of evidence on relevance and Rule 403 grounds.

A. The Court of Appeals did not misapply the standard of review. Appellant is effectively seeking *de novo* review, when the abuse-of-discretion standard applies.

B. The trial court did not abuse its discretion in excluding the jailhouse recordings as irrelevant.

C. The trial court did not abuse its discretion in excluding the jailhouse recordings because any slight probative value is outweighed by the considerations of Rule 403.

D. Appellant's argument within its brief of its second ground also challenges the exclusion of evidence as hearsay, but the grounds presented in Appellant's petition for discretionary review do not provide a basis for reviewing the trial court's hearsay rulings.

E. The trial court did not abuse its discretion in excluding the jailhouse recordings as hearsay.

FACTS

Daniel Villegas, Appellee, spent almost two decades behind bars for a crime he did not commit. The State of Texas, Appellant, appeals pretrial evidentiary rulings in advance of a third trial for the crime. In an effort to prejudice this Court, Appellant's brief includes its own version of the underlying circumstances, inappropriate accusations, reliance on coerced and false statements, and sidebar denials that it ever made any mistakes or omissions. The word limit of the Rules precludes a complete response.[3] Appellee disputes Appellant's statement of facts in its entirety. TEX.R.APP.P. 38.1(g).

A. The shooting.

On April 10, 1993, Armando Lazo, Robert England, Jesse Hernandez, and Juan Medina were walking home from a party. (19CR:6697).[4] At the intersection of Woodrow Bean Transmountain and Electric, gunfire erupted from a car. (5CR:1533-35). Lazo and England were killed. (5CR:1640,1645). [*See* Appendix 1 (herein, "Appx1"), ¶¶ 1-3].

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[3] A more thorough response was filed on August 17, 2017; this Court denied Appellee's motion to exceed the word limit.

[4] Both parties' briefs cite to the record of the two trials and the habeas corpus hearings. As noted by the Court of Appeals, the trial court took judicial notice of those records, by agreement. *Villegas*, 506 S.W.3d at 731.

England's body was discovered 148 feet from six .22-caliber bullet casings found grouped together on Electric. (5CR:1616-17). [Appx1, ¶ 2]. Lazo was shot twice, with both bullets entering the front of his body. (15CR:5401-06). His body was found on the doorstep of a corner home. (5CR:1569). The residents called 9-1-1 at 12:18 a.m., after hearing a series of shots. (5CR:1566-67; 19CR:6736). Except for the cluster of six casings, no shell casings were found in the vicinity. (15CR:5387). [Appx1, ¶ 3].

B. Daniel Villegas was not involved.

Daniel Villegas had nothing to do with the shooting. (16CR:5824). He was watching movies with Marcos Gonzalez and Rodney Williams at the Village Green Apartments, as numerous witnesses attested. (6CR:1981-84; 3CR:905-08, 6CR:1732-33, 9CR:3095-98; 4CR:1280-81, 7CR:2254-60; 7CR:2318; 16CR:5870-78). [Appx1, ¶¶ 17(c), 62, 63, 67].

Appellant incorrectly claims that Villegas presented inconsistent alibis. (A'nt brf. p. 5 & n. 7). It claims he said he was at Boomerangs Theater. The testimony established that he was at this theater earlier, and went to the apartments later. (7CR:2293-97, 2325-28; 16CR:5875-78). It claims he told the juvenile probation officer that he was at the home of "Negro." "Negro" lived at the Village Green Apartments, and Villegas gave his name to the officer as a potential witness to his

location when she asked, "if he could produce someone to testify to him being elsewhere." (16CR:5920, 19CR:6696).

Despite his innocence, Villegas confessed. (16CR:5824). His confession was false, but was coerced by threats and intimidation from El Paso Police Detective Alfonso Marquez, who led the investigation, under circumstances detailed below. (16CR:5824; *see Facts § E, infra*; Appx1, ¶¶ 29-40; Appendix 2 ["Appx2"], ¶¶ 13-45). The police tactics also caused 15-year-old Michael Johnston to falsely confess to the crime, although Marquez later concluded he was not involved (6CR:1841, 7CR:2137-41, 2150-52, 15CR:5498-5501; *see Facts § D.2, infra*); caused 15-year-old Rodney Williams to falsely confess that he was in the car when the shooting occurred, even though murder charges against him were dismissed due to lack of evidence (6CR:1777-78; 14CR:4991-99, 5007; 17CR:6251; *see Facts § D.4, infra*); caused 18-year-old Marcos Gonzalez to falsely confess that he was in the car at the time, even though charges against him were also dropped (6CR:1952-53, 1972-73, 1976, 1849; 19CR:6720-21; *see Facts § F, infra*); and even caused surviving victim Hernandez to come close to confessing (14CR:4817-18; *see Facts § D.1, infra*).

Villegas retracted his false confession as soon as he was away from Detective Marquez's influence. (4RR:38-39; 19CR:6696; *see Facts § H, infra*). His false confession is inconsistent with physical evidence and other evidence from the

investigation, and contains details that are factually impossible. (*See Facts § G, infra*). No evidence corroborates any part of Villegas's statement. (4RR:152).

Hernandez and Medina did not recognize the shooter and did not identify Villegas. (15CR:5388-89). There is no physical, forensic, or scientific evidence tying him to the scene. (15CR:5388). He was convicted based on his false confession. (19CR:6843).

C. Rudy and Javier Flores.

At least four people reported to police that they believed Rudy Flores and/or Javier Flores were responsible. (19CR:6698). Rudy was a gang member, and Javier was his older brother. (19CR:6698). [Appx1, ¶¶ 4, 9]. Connie Martinez-Serrano testified regarding Rudy or Javier as the possible killer, and the location of a .22 caliber gun she saw taken from a closet in their home shortly after the shooting. (14CR:5221-25, 5229). [Appx1, ¶ 129(b)].

Two weeks earlier, Rudy had a confrontation with the victims, and threatened to kill Lazo. (17CR:6253). Rudy had a car similar to the one described by the surviving victims. (17CR:6253). Javier had confrontations with Lazo and fought him at school. (14CR:5104). [Appx1, ¶¶ 4, 126].

Rudy told police he drove past the party the victims attended about an hour before the shooting; he was in a car on Transmountain at midnight; and he was at the

intersection where the shooting occurred between 12:15 and 12:20 a.m. (19CR:6644-45). This places him at the scene of the crime at the time of the shooting. He claimed he got home a minute or two later, although Javier gave a statement that Rudy was not home at 12:30. (19CR:6644-47). [Appx1, ¶¶ 10, 11].

Rudy and Javier later boasted that Villegas was locked up for what they did. (14CR:5172-73). Javier is now deceased. At Villegas's writ hearing, he called Rudy to testify. (16CR:5745). Rudy refused to answer any questions, invoking his Fifth Amendment privilege. (16CR:5754-55, 5802-05). [Appx1, ¶¶ 129(a), 131].

D. Detective Marquez coerced false statements from teenagers.

Detective Marquez boasted he could obtain a confession to this crime at any point if "he really wanted to." (10CR:3258). [Appx1, ¶ 79(c); Appx2, ¶ 63]. He intimidated and frightened teenaged boys until they told him what he wanted to hear:

1. Jesse Hernandez.

Surviving victim Hernandez was summoned for questioning two days after his initial report. While Hernandez was writing, Marquez took his statement, told him to "just cut the bullshit," and threw it at him. Marquez accused him of killing his friends, claiming Medina implicated him. Marquez threatened that if he didn't confess, he would get the death penalty. He brought Hernandez to tears. He made Hernandez wonder if he had "blacked out" and committed murder. Hernandez nearly

confessed; he "would have signed anything" to get out of there. (14CR:4814-18); [Appx1, ¶ 8; Appx. 2, ¶ 54].

2. Michael Johnston.

Marquez participated in the questioning of 15-year-old Michael Johnston. (6CR:1836). Johnston was handcuffed and interrogated for eight hours. Marquez accused Johnston of the crime, and lied that his friend implicated him. He screamed in Johnston's face. He threatened Johnston with the electric chair, and threatened he would be molested and raped in jail if he did not confess. Johnston feared the detectives and feared for his life. (7CR:2137-41).

Johnston was so scared he confessed. (7CR:2150). He was never charged. Marquez admits his confession was false and he had nothing to do with the shooting. (15CR:5498-5501). [Appx1, ¶ 12; Appx2, ¶ 55].

3. David Rangel.

The police department told Patricia Cate they needed to question her 17-year-old son, David Rangel, regarding a telephone harassment complaint, threatening her with an obstruction of justice charge. (14CR:4849-50). Instead, Rangel was questioned about the shooting. (14CR:4881-82).

Marquez accused Rangel of committing the murders and lied that others implicated him. He threatened Rangel with life in prison if he did not confess, and

that he was a "pretty white boy with green eyes" who could expect to be "f****d" in prison. Rangel did not know what Marquez was talking about. However, he remembered a "creative story" his cousin Villegas told him. (14CR:4882-85, 4889).

Rangel told the detectives that during a telephone call with Villegas and Marcos Gonzalez, Villegas told him about shooting the victims with a shotgun. He told the detectives that they were laughing and Villegas was joking. (14CR:4887-89). Rangel wrote a statement documenting this call, including that Villegas said he used a sawed-off shotgun; Marquez threw this statement in the garbage because it was "not correct." (14CR:4889-92). He ordered Rangel to sign another statement that did not mention the type of gun. (14CR:4893). He threatened that if Rangel did not sign the new statement, he would be charged with the murders and would not be released. Rangel signed it; he would sign "pretty much what was in front of" him as he was "just trying to get out of there." (14CR:4898). [Appx1, ¶ 14; Appx2, ¶ 56].[5]

Appellant's brief falsely claims that Villegas's story to Rangel, as described in the statement Rangel signed, was "consistent with details of the crime." (A'nt brf. p. 2). Besides the detail that a shotgun was used, which Marquez ordered removed, the statement was inconsistent with other evidence, including the color of the car and

[5] Contrary to Appellant's accusation of inconsistencies, Rangel has testified consistently to these events since the suppression hearing before the first trial. (2CR:403-07).

descriptions of verbal exchanges and gestures in the encounter. (5CR:1557-58; 17CR:6244, 6248-49; 19CR:6708). Rangel's statement also reported that Villegas shot Lazo, saw him run, then "chased him to the house and there shot him again;" but no shell casings were recovered near Lazo's body or anywhere else except the one location on Electric Street, and the neighbors reported only one series of consecutive shots. (5CR:1566-67; 15CR:5387; 17CR:6248-49; 19CR:6736, 6804-05). [Appx1, ¶ 15]. According to Appellant, Villegas became a suspect after Rangel's statement. (A'nt brf. p. 2).

4. Rodney Williams.

Fifteen-year-old Rodney Williams was then questioned. (14CR:4979-81). Detective Earl Arbogast questioned Williams; he concluded Williams had nothing relevant to add. (13CR:4528-29). Detective Scott Graves then interrogated Williams for five to six hours. He insisted Williams was present when Villegas shot the victims; Williams maintained neither were involved, and they were watching movies. He threatened that if Williams did not admit involvement, he would go to jail and be brutally raped. He promised they only wanted to prosecute Villegas, and he could go home if he gave an inculpatory statement. (6CR:1775; 14CR:4982-91). Williams

eventually agreed to sign a false statement prepared by the officers. (14CR:4991-99). [Appx1, ¶ 17].[6]

The statement signed by Williams said he and Villegas were in a car with Marcos Gonzalez, "Popeye" and "Snoopy." (17CR:6251). It stated "Popeye" handed Villegas a gun, Villegas fired out the window, one of the victims fell to the ground, and the other was shot in the back. (17CR:6251).

After signing, Williams was arrested for capital murder. (6CR:1777; 14CR:5004). The charges were dropped after the prosecutor announced in open court that there was insufficient evidence. (6CR:1778). [Appx1, ¶¶ 18, 19].

E. Sixteen-year-old Villegas was coerced into a false confession.

On April 21, 1993, Villegas was sixteen years old. (16CR:5828). Detectives Marquez and Arbogast arrested 18-year-old Marcos Gonzalez and Villegas together. (16CR:5274-25, 5825-26). [Appx1, ¶ 20; Appx2, ¶¶ 1, 2]. In contradiction to the Family Code's requirement that they take Villegas to a juvenile processing office without delay, TEX.FAM.CODE § 52.02, Marquez and Arbogast drove him to various locations and questioned him, then stopped to confer outside of their vehicles while Villegas and Gonzalez waited. (16CR:4826-28). [Appx1, ¶¶ 21-23; Appx2, ¶¶ 7-10].

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[6] Contrary to Appellant's accusation of inconsistencies, Williams has testified consistently to these events since his first testimony, in the 1994 trial. (6CR:1773-77).

Villegas and Gonzalez were then driven to police headquarters, where Marquez threatened Villegas that he was "going down for the murders," and "We know you did these shootings and we are taking your ass to jail." (16CR:5828-29). After confirming he was a juvenile, Marquez took him to Juvenile Investigative Services at approximately 11:30 p.m. (13CR:4546). He was handcuffed to a chair for about an hour. Marquez accused him of the murders, telling him Williams had implicated him. Marquez threatened that if he did not confess, he would be put in jail and raped. He threatened to take Villegas to the desert and "beat the ****" out of him. When Villegas maintained his innocence, Marquez slapped the back of his head. Villegas was "terrified out of my mind." (16CR:5831-34). [Appx1, ¶ 29; Appx2, ¶ 29].

Villegas was taken to the juvenile probation department, where the intake officer documented at 12:26 a.m. (before he saw a magistrate) that Villegas had agreed to "give a confession." (16CR:6227). Villegas was then finally taken before a magistrate. (13CR:4559). But Marquez threatened, "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, m**********r. I am going to take you to the desert and beat your ass." (16CR:5836). [Appx1, ¶¶ 30-33; Appx2, ¶¶ 30-33].

Villegas told the magistrate he would give a statement, because he was "mentally paralyzed" by Marquez's threats. (16CR:5835-36). "Anything he said at that point I was going to do." (16CR:5835). [Appx1, ¶ 34; Appendix, ¶ 34].

Villegas was returned to Juvenile Investigative Services, handcuffed and questioned further. (16CR:5837). After being told Williams implicated him, Villegas told the following story while Marquez typed: Villegas and Williams were at the Village Green Apartments, and were approached by a group of black males with a gun. Williams alone left with them, telling Villegas that he was going to do "something crazy." Williams returned later and told Villegas he had killed Lazo and England. (16CR:5837). [Appx1, ¶ 35; Appx2, ¶ 36].

Marquez took the paper from the typewriter, crumpled it, and slapped the back of Villegas's head. (16CR:5837). He threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess. (16CR:5837-38). He said Williams named "Snoopy" and Gonzalez as accomplices. (16CR:5841). Villegas told Marquez he did not know "Snoopy," but did know a "Droopy." (16CR:5841). Marquez left the room, then returned to say Gonzalez had also implicated him. (16CR:5843). [Appx1, ¶¶ 36-38; Appx2, ¶¶ 37-39].

Marquez's coercion and threats left Villegas so "mentally drained" and "exhausted" that he agreed to falsely implicate himself, just to get away from him.

(16CR:5845-46). He agreed to sign a one-page statement prepared by Marquez. (16CR:5845-56). Marquez typed the statement, and Villegas signed it at 2:40 a.m. (19CR:6876-78). [Appx1, ¶¶ 39, 40; Appx2, ¶¶ 41, 42].

F. The detectives collaborated to obtain a false statement from Marcos Gonzalez corroborating Villegas's false confession.

While Marquez interrogated Villegas, Graves interrogated Gonzalez. He threatened to beat Gonzalez, and to put Gonzalez in jail where he would be "screwed by fat, old men," unless he confessed. (6CR:1970). He promised Gonzalez that he was only interested in going after Villegas. When Gonzalez refused to confess, Graves slammed him against the wall. (6CR:1957). After hours of denials and intense interrogation, Gonzalez signed a false statement typed by the detectives. (6CR:1952-53, 1972-76). [Appx1, ¶ 25].

Marquez and Graves communicated during the simultaneous interrogations. (7CR:2034). Graves learned that pertinent details in Villegas's statement conflicted with Gonzalez's first statement. (7CR:2033-34). He then obtained a second statement from Gonzalez which was inconsistent with his first, but corroborated Villegas's false confession. (7CR:2033-34). [Appx1, ¶¶ 41-43; Appx2, ¶ 40]. In particular:

Villegas's statement (19CR:6877)	*Gonzalez's first statement (19CR:6718-19)*	*Gonzalez's second statement (19CR:6720-21)*
Gonzalez was present at the shooting	Gonzalez got out of the car earlier and was not present	Gonzalez was present at the shooting
The driver was "Popeye"	The driver was "Snoopy"	The driver was "Popeye"
The front passenger was "Droopy"	The front passenger was "Popeye"	The front passenger was "Droopy"

Gonzalez's second statement also included new details omitted from the first, but consistent with Villegas's false statement. (19CR:6719-21, 6877). [Appx1, ¶ 44-46].

After his statements, Gonzalez was charged with capital murder; but never prosecuted. (6CR:1849, 1971). [Appx1, ¶ 47].

G. Villegas's false confession was uncorroborated, and demonstrably false.

Villegas's statement (19CR:6877) contained details that are demonstrably false, factually impossible, and conflicted with other evidence. It stated "Popeye" was driving, but "Popeye" was incarcerated at the time. (6CR:1848; 19CR:5426-27). It stated "Droopy" was present, but "Droopy" was under house arrest, and his electronic monitor confirmed he did not leave home. (19CR:5426-27). It stated the boys committed a "beer run" at a certain store before the shooting, but no beer was stolen at that store that evening. (7CR:2287-90; 19CR:5468). It stated the car involved was white, but the surviving victims reported it was maroon, red, or goldish; in the story

repeated by Rangel, it was black; and in Gonzalez's first statement, it was beige. (17CR:6244, 6248; 19CR:6708, 6718). [Appx1, ¶¶ 48, 51; Appx2, ¶ 43].

Hernandez did not see Villegas's statement before Villegas was convicted; years later, he recognized that it did not describe the events he witnessed. (14CR:4818-19, 19CR:6727). Medina agrees. (19CR:6740). Even Marquez admits that portions were wrong and did not make sense. (15CR:5482). Arbogast is aware of no evidence corroborating any part of it. (4RR:152).

H. Villegas immediately recanted his false confession.

As soon as he was away from Marquez's influence, Villegas recanted his statement. (19CR:6696). Juvenile probation officer Monica Sotelo met with Villegas a few hours after the false confession. (4RR:35-36). He was shaking and looked scared. (4RR:37). He told her "he didn't do it," and was not in the area. (4RR:38). He confessed because "the cops kept harassing him." (19CR:6696). He was "tired and wanted to go back to sleep, so [he] told them what they wanted to hear." (19CR:6696). [Appx1, ¶ 52; Appx2, ¶¶ 47, 48].

A forensic psychiatrist diagnosed Villegas with conditions which could "easily" lead him to falsely confessing. (19CR:6769-70). [Appx1, ¶ 70; Appx2, ¶¶ 49-52]. Dr. Richard Leo, a renowned expert on false confessions, testified there were numerous "earmarks, red flags, giveaways of potential problems" that should have

led Villegas's attorney to call an expert on false confessions; and identified specific facts in this case consistent with false confessions. (15CR:5645-46, 5679-94).

The district court has found Villegas's statement involuntary, and ordered it suppressed for the third trial. (22CR:7683-98). Appellant takes pains to justify its failure to appeal this ruling; but it did not even call Marquez as a witness at the suppression hearing. (4RR:1-267; 5RR:1-53; Appx2, ¶ 57). The false confession led to Villegas being convicted, and spending almost two decades behind bars.

I. The first trial.

In Villegas's first trial, he was represented by retained counsel Jaime Olivas. (5CR:1506). Olivas put on eighteen witnesses to support an alibi defense, and that the statements resulted from intimidation and coercive interrogation tactics, and were unreliable. (5CR:1511-14; 7CR:2089-2401). [Appx1, ¶ 66]. The jury was deadlocked because of legitimate disagreements between jurors, resulting in a mistrial.[7] (19CR:6760; 1CR:95). [Appx1, ¶ 74].

J. The State concealed or destroyed exculpatory evidence.

The crime was investigated by a private investigator, Tony Kosturakis. (19CR:6836). He audiotaped witness interviews. (19CR:6836). Unfortunately, he

[7] Appellant's brief mischaracterizes this as a "freak" mistrial. (A'nt brf. p. 4). It cites only to a statement from John Gates, who was not present at the time. Olivas disagrees with Gates's characterization. (19CR:6760).

is no longer able to remember their details. (19CR:6836). However, he recalls that on the audiotape, a witness identified the real killer, and a witness told him the location of the murder weapon. (19CR:6836). [Appx1, ¶¶ 56, 130]. His recollection of that location is consistent with Martinez-Serrano's testimony. (14CR:5221-25, 5232-33; 19CR:6836). Kosturakis found the witness credible. (19CR:6836).

Martinez-Serrano directed Kosturakis to others who could identify the real killer. (14CR:5250). The district attorney reported after the first trial that Kosturakis contacted him about "a tape recorded conversation of Koni (phn.) [*sic*] Martinez[.]" (20CR:7150). He said Kosturakis had information that besides Martinez-Serrano, a "Sally" and "one other person" had evidence of Villegas's innocence. (20CR:7150).

The district attorney told the court that the audiotape blamed the Flores brothers; but discounted it by representing that it was "pretty well documented" that Javier was not there. (20CR:7150, 7152). This ignores Rudy's statement placing himself at the scene of the crime, at the exact time it occurred. (19CR:6644).

Kosturakis turned the audiotape over to Marquez, assuming it would be in evidence. (19CR:6836). Marquez testified at the second trial he "did not recall" whether he took the audiotape, but "would venture to say" Kosturakis gave it to him. (4CR:1062). Sixteen years later, he variously denied taking it and said he did not remember. (15CR:5514-19).

Before the second trial, Villegas's attorney requested to inspect any "documents or tapes or video tapes" from Kosturakis. (3CR:559). The district attorney stated he never received any "documents." (3CR:559). He promised to check with police officers; but claimed "the only thing the State received" was a telephone message, and he would check to see "if I still have it," raising the question of why he would not "still have" any potentially exculpatory materials at all. (3CR:559-60). Villegas's counsel never received the audiotape. (18CR:6264). [Appx1, ¶ 56].

K. The second trial.

The trial court appointed a new attorney, John Gates, to represent Villegas for his second trial, a mere sixty-seven days before the trial date. (18CR:6262). The case required much more preparation than Gates did or had time to do. (14CR:5198-99; 18CR:6262-65). [Appx1, ¶¶ 75, 123, 127, 128]. This Court later found his representation ineffective. *Ex parte Villegas*, 415 S.W.3d 885 (Tex.Crim.App. 2013).

The district attorney convinced Gates to enter a stipulation inconsistent with the medical evidence. (18CR:6265, 6612). Lazo was shot twice. (5CR:1711; 18CR:6615-16, 6631). The autopsy report and checklist establish that he sustained a single bullet wound to the front mid-section of his abdomen; and a second bullet entered the front inner portion of his thigh. (18CR:6615-16, 6631). [Appx1, ¶ 78(c)].

The placement of the wounds was significant: it is inconsistent with Villegas's false confession, which stated that Lazo was running away when he chased him down and shot him, implying Lazo was shot in the back. (19CR:6877). To avoid the inconsistency, the district attorney convinced Gates to stipulate that Lazo "died as the result of two (2) bullet wounds to the stomach area and suffered a third bullet wound to the left thigh." (18CR:6265, 6612). This cost Gates the opportunity to highlight the medical evidence that Lazo was not shot in the back, making the confession factually impossible. (18CR:6265). [Appx1, ¶ 127].

The district attorney knew the stipulation was false: he told the jury in the first trial Lazo was shot twice. (20CR:7119). However, he emphasized it to the jury, arguing, "I put three bullets in one person. I think I intended to kill that person." (10CR:3406). He used the false stipulation to make the facts appear more consistent with the false confession, and to secure a conviction regardless of the truth. The only explanation for Gates's decision lies in the finding that his representation was ineffective. There is no explanation for the district attorney's action.

The jury convicted Villegas because of his false confession. (10CR:3414; 19CR:6843). He was sentenced to spend the rest of his life in prison. (10CR:3416).

L. John Mimbela.

In 2007, John Mimbela learned about Villegas's case, when he married into the family. (19CR:6839). Although initially skeptical of his parents' belief that Villegas was innocent, Mimbela looked into it. (19CR:6839). After reviewing the records and learning about false confessions, Mimbela came to believe that Marquez did not properly investigate and ignored the right suspects. (19CR:6839). He became convinced that Villegas was wrongfully convicted, did not receive a fair trial, and is innocent. (19CR:6839; 16CR:5963, 5972).

Many of the recordings now at issue are of Mimbela talking to Villegas, particularly about witnesses. Mimbela has talked to anyone who would listen about the case, including witnesses. (19CR:6839). He shared with witnesses information he learned, to see if they agreed. (16CR:5972-74). He never pressured anybody into false or unwilling testimony. (19CR:6839).

The record does not support Appellant's accusations that Mimbela conspired with Villegas, acted as Villegas's agent, nor that he sought to have witnesses testify falsely. The record does not support Appellant's broad claim that the recordings "confirm" that "something untoward was going on." And the record certainly does not support Appellant's accusations that Mimbela offered financial benefits to witnesses to influence their testimony, manufacture evidence, or suppress evidence.

It is significant that the paragraph of Appellant's Statement of "Facts" making these accusations contains only a single citation to the record – and this citation is only to an argument by an assistant district attorney, not any evidence. (A'nt brf. pp. 5-6). In response to that argument, the trial court recognized, "Nothing you have told me rises to the level of any impropriety on behalf of this individual." (16CR:5948). Appellant's conspiracy theory is invented out of whole cloth.

Shortly after the cited argument, Appellant examined Mimbela. (16CR:5954-83). Nothing in that testimony suggests any wrongdoing, as Appellant's brief in the Court of Appeals admitted. (16CR:5954-83; Appellant's Court of Appeals brief [herein, "A'nt COA brf."] p. 29). Its accusations are unwarranted and unsupported.

M. The habeas corpus application.

Villegas filed an application for writ of habeas corpus. (4CR:1227; 11CR:3612-13; 12CR:4117-39). The trial court received extensive evidence and exhibits. (13CR:4505-19CR:6988). As the evidentiary hearing progressed, and it became clear that Villegas is innocent, it also became clear that Appellant would undertake any effort to uphold the conviction:

Rudy was incarcerated, and was brought to El Paso on a bench warrant. (11CR:3953). When his attorney, Joe Vasquez, attempted to contact him, jail officers barred him, stating "they needed to contact the district attorney's office and get

clearance from them before [Vasquez] would be allowed to visit with Mr. Flores." (16CR:5763). After this was brought to the trial court's attention, the office of the district attorney had Rudy taken from the jail to its own offices to meet with Vasquez, an unprecedented action. (16CR:5764, 5775).

Vasquez was concerned that by testifying, Rudy would waive his Fifth Amendment privilege. (16CR:5765). Appellant convinced Rudy to sign an affidavit, which it offered into evidence, denying his involvement. (16CR:5765-66, 5771-72, 5808-09). It promised that if his Fifth Amendment privilege became an issue, it would not use or would withdraw the affidavit. (16CR:5765, 5774-75). Appellant denied and broke this promise. (16CR:5782).

The affidavit caused the trial court to find that Rudy waived his privilege. (16CR:5794). He nonetheless refused to testify, and was held in contempt. (16CR:5802-05). Appellant was thus able to offer the testimony it wanted from Rudy; while Villegas was unable to cross-examine or obtain his testimony. (16CR:5808-09). [Appx1, ¶ 131].

Appellant also presented an affidavit from Onnie Kirk, who claimed he was incarcerated with Villegas in 1994, and Villegas admitted to shooting two people. (19CR:6861). Kirk's affidavit is demonstrably false: Villegas was released on bond

in September 1993. (19CR:6866, 6867). He remained free during the entire calendar year of 1994, until his conviction in 1995.

Appellant also took the position that Villegas confessed to his mother, in a recording still at issue. Villegas told his mother about his prayers. (19R:6973). Appellant claimed that he stated, "Please God, let me get out of here -- even though I'm not innocent, woo, woo, woo, woo, woo." (16CR:6138). He actually said, "Please God, let me get out of here -- **even though I'm not here to tell you** whoo, whoo, whoo." (19CR:6853). Yet Appellant continues its misstatement in this appeal.

Villegas provided the trial court with a correct transcript and the actual recording, and encouraged the court to listen to it. (17CR:6204-05, 19CR:6845-60). The trial court found Villegas's actual statement irrelevant. [Appx1, ¶ 133].

This Court granted the writ of habeas corpus based on ineffective assistance of counsel. (21CR:7390).

N. After Appellant produced hundreds of hours of recordings, the trial court conducted a pretrial admissibility hearing.

This appeal arises from the trial court's exclusion of recorded jailhouse conversations before a third trial. After the writ was granted, Appellant produced about 1400 hours of recordings, of thousands of conversations. (3RR:5-6). The trial court asked Appellant to confer with Villegas's counsel about which were relevant, to permit

resolution of any disagreement about their contents. (3RR:6-7). Appellant's counsel claimed they were all relevant. (3RR:7).

Instead of attempting to listen to hundreds of hours of recordings during trial to determine admissibility, the trial court instructed Appellant to identify those it wishes to offer, and conducted a pretrial admissibility hearing. (21CR:7559; 9RR:1-98). Appellant identified 39 recordings it wishes to offer. (22CR:7700). Villegas filed a motion for *in camera* review, and the judge listened to the recordings before the hearing. (22CR:7706; 9RR:5).

No evidence was offered except the recordings themselves. (9RR:1-98). The trial court excluded the recordings at issue because they constitute hearsay, are irrelevant, and any probative value is outweighed by the other considerations under Rule 403. (9RR:24, 37, 46, 53, 66, 72, 78, 89, 94).

O. Content of the recordings

There are 37 recordings at issue. Appellee assumes *arguendo*, without conceding, that Appellant's brief in the Court of Appeals accurately transcribed the recordings, except for the one designated by Appellant as 2B.[8] Appellant's claim that Villegas stated he was "not innocent" in recording 2B is false.

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[8] The Court of Appeals also relied on Appellant's transcripts, without finding them correct. *Villegas*, 506 S.W.3d at 740 n. 12. The letter-and-number designations correspond to the issues presented by Appellant in its brief in the Court of Appeals.

1. Villegas never stated he was "not innocent," and made no other statements from which guilt could reasonably be inferred.

Appellant argues Villegas made an "admission of guilt," claiming he stated in recording 2B, "Please, God let me get out of here so – ***even though I'm not innocent*** ... ." (A'nt brf. p. 6, emphasis added). In fact, he stated:

> I've been saying the same prayer for 17 years. ... After you do something for so long, Mom, I don't care how much you think you can do it. You can't do it. It's just too much. You can do it, but you don't do it with emotion anymore. It's like, Oh, well, whatever. Please, God, let me get out of here -- ***even though I'm not here to tell you*** whoo, whoo, whoo. It's the same thing, the same prayer.

(19CR:6853, October 12, 2011 recording at 16:36-17:39, emphasis added). Villegas also wished that "they hurry up and give me justice," inconsistently with Appellant's claim that he made an admission of guilt in the same conversation. (19CR:6852, October 12, 2011 at 16:13-16:19).

Appellant mischaracterizes or removes from context statements in other recordings to claim Villegas admitted guilt. Recording 2A refers to "actual innocence" grounds for habeas relief, not whether Villegas was actually innocent of the crime. Although Appellant omits relevant context, Villegas and his mother discussed meeting with a lawyer, and his belief that "actual innocence" was necessary for federal habeas relief. (19CR:6925; March 14, 2011 at 43:57-44:26). In the same conversation, in a

statement omitted by Appellant, Villegas recognized, "if you look at the evidence, they shouldn't have even, never even convicted me." (March 14, 2011 at 44:42-44:46),

At a hearing, an assistant district attorney read Appellant's incorrect version of recordings 2A and 2B. (16CR:6089, 6138). In recordings 2C, 2D and 2E, Villegas – not suspecting the State of Texas would create a false transcript – tried to understand those statements. (9RR:85-87). He recognized that Appellant "twisted" his words, "misconstrued" them, and "flipped" them to make its own meaning. (A'nt COA brf. p. 68, 70). Villegas and Mimbela also recognized that in prayer, stating one is "not innocent" does not refer to the crime at issue or any other particular crime. (A'nt COA brf. p. 68-70).

Appellant even misinterprets recording 2F – repeating a statement to another inmate, "you wouldn't be in here if you didn't do something" – as an admission that Villegas committed murder. (A'nt COA brf. p. 70). Appellant's description of these recordings as permitting an inference of guilt is clearly a mischaracterization.

2. Discussions of witnesses.

Recordings 3A through 8D relate to potential witnesses, while Villegas was pursuing habeas corpus relief. They describe the search for information, desire for witnesses to tell the truth, and hope to find evidence to locate the real killer. Nothing

supports Appellant's accusations that Villegas desired false testimony or tampered with witnesses.

- ***Wayne Williams***

Appellant asserts that recordings 3A through 3F refer to Wayne Williams. (A'nt brf. p. 8). They reflect only Mimbela's attempt to obtain information from a potential witness, repetition of a person's unrecorded out-of-court statements about what he claimed Villegas once said, and Villegas's denial:

Recordings 3A and 3B are ambiguous, and indicate Mimbela is trying to find someone who informed Villegas that Rudy was responsible for the murders. (A'nt COA brf. p. 86-88).

In 3C, Mimbela repeats what Wayne Williams purportedly stated in an unrecorded out-of-court statement – that Villegas was "kind of bragging" he had done it; Villegas told Mimbela he was lying. (A'nt COA brf. p. 88-89). In 3D, Mimbela said he was offering Wayne Williams a job so he would be close, hoping to obtain information. (A'nt COA brf. p. 89). Although Appellant omits this context, in the same conversation, Mimbela expressed his hope to find the real killer. (9RR:14, 34; July 27, 2009[9] at 6:22-6:41).

[9] Conversation beginning at 20:27:58 (8:27 p.m.).

In 3E, Mimbela reported more about what Wayne Williams purportedly said in the out-of-court statement, including that Villegas allegedly said he shot the victims with a shotgun. (A'nt COA brf. p. 89-91). Villegas again stated he was lying. (*Id.*). Mimbela noted this was the same as Villegas's "creative story" to Rangel, even though the victims were not killed with a shotgun; the two mused that Villegas might have told Wayne Williams what he said to Rangel. (*Id.*; *see* 14CR:4887-89). In 3F, Mimbela discussed the same out-of-court statement, and Villegas reiterated that he was lying. (A'nt COA brf. p. 91-92).

- ***Jesse Hernandez and Juan Medina***

Recordings 4A through 4E relate to the surviving victims. Some of them refer to sporting events, and there is no doubt on the record that Mimbela is a generous person; he bought 150 tickets to a football game for employees. (9RR:26).

In 4A, Mimbela stated he had hired Medina. (A'nt COA brf. p. 109). Although Appellant omits this context, in the same conversation, he expressed his hope to find the real killer. (9RR:14, 34, July 27, 2009[10] at 6:22-6:41).

In 4B, Mimbela said he gave Hernandez tickets to the Sun Bowl. (A'nt COA brf. p. 109-10). In 4C, Mimbela said Medina had been helping; and (after conversation omitted from Appellant's transcript) that he had been helping Medina. (A'nt COA brf.

[10] This is the same recording as 3D, beginning at 20:27:58 (8:27 p.m.).

p. 110). In 4D, Mimbela said he had given Hernandez and/or Medina tickets to a boxing match; and Hernandez thanked Mimbela for "everything you're bringing out" because "I didn't want to continue to live this lie." (A'nt COA brf. p. 110-11). In 4E, Mimbela discussed taking Hernandez and Rocio to a boxing match; and reported "they" said they would "stay with this" until Villegas is out of prison. (A'nt COA brf. p. 111-12). This conversation apparently occurred in connection with the report about this case later broadcast on NBC Dateline. (9RR:29-30).

Nothing in these recordings suggests that Mimbela offered anything to Hernandez or Medina for any *quid pro quo* – much less that he tampered with their testimony, or that Villegas conspired to do so.

- ***Rudy Flores***

Recordings 5A through 5G relate to Rudy Flores. Mimbela offered a reward for information bringing the real killer to justice. These recordings discuss making Rudy aware of the offer, in hopes that he would provide information, if he knows who was the real killer:

In 5A, Mimbela repeated hearsay that Rudy knows who did it. (A'nt COA brf. p. 118-19). Other recordings reflect Villegas's awareness that Rudy's statement placed Rudy at the scene of the crime, and his belief that Rudy knew who committed it. (19CR:6928, 6957, 6959).

In 5B, Villegas stated, "If he wasn't the triggerman, hopefully he'll come out with it." (A'nt COA brf. p. 119). In 5C, Mimbela expressed hope that Rudy would speak, "In fact, if he does know who did it or if he was involved." Villegas replied, "That sounds good. I just hope he can get [Rudy] to say it." (A'nt COA brf. p. 119-20).

In 5D, Villegas said his attorney was going to visit Rudy to see if he would speak, stating, "That would be the best thing because that'll clear my name." (A'nt COA brf. p. 120-21). In a recording dated between 5D and 5E, Mimbela discussed approaching Rudy to "tell us the truth," and Villegas responded he was "praying for him, man, that he goes in and 'fesses up." (February 5, 2011[11] at 11:34-12:31).

In 5E, Yolanda said she believed Rudy was guilty, and did not like the thought of paying him; Villegas responded that somebody (apparently one of the Flores brothers) "seemed like a big coward[.]" (A'nt COA brf. p. 121). In 5F, Villegas again hoped that Flores would "fess up." (A'nt COA brf. p. 121). In 5G, Yolanda reported hearing that Rudy refused to meet with Villegas's attorney. (A'nt COA brf. p. 122).

None of these recordings suggest any attempt to tamper with testimony or fabricate evidence. They refer instead to hoping that Rudy will "come out with it" or "fess up," if he knows the truth. Nothing in them suggests a hope or belief that Rudy

[11] Conversation beginning at 09:26:36 (9:26 a.m.).

will testify falsely. Nothing in them rationally supports Appellant's accusation that the reward was offered to "pin the murders" on someone. (A'nt brf. p. 11).

- ***Araselly Flores and Jose Juarez***

Recordings 6A through 6C refer to Araselly Flores and Jose Juarez. In 6A, Mimbela reiterates telling them about trying to find the killer, and thinking they needed money, "so if she knows something ... ." (A'nt COA brf. p. 129-30). In 6B, Mimbela discusses reminding them of the reward, and reassuring them not to be afraid. (A'nt COA brf. p. 130-31). In 6C, Mimbela said he visited Juarez's father, making him aware of the reward "if your son knows anything about it." (A'nt COA brf. p. 131-32). Villegas recalled Rudy's statement indicating Juarez was in the car, and Mimbela responded they "think he knows something" and "might know who pulled the trigger." (A'nt COA brf. p. 131-32).

Again, nothing in these recordings rationally suggests that the reward was offered to "pin the murder" on someone, rather than for information leading to the real killer. Nothing in them suggests that the reward was offered for untruthful testimony, nor does anything in the record support that accusation.

- ***Rodney Williams***

Recordings 7A through 7C refer to Rodney Williams. Appellant attempts to bolster its misinterpretation with its own perspective of Villegas's emotions, not just his words. (A'nt brf. p. 13). These recordings have nothing to do with this prosecution.

In 7A, Villegas refers to an unspecified "oath" and feeling forgotten while he was incarcerated. (A'nt brf. COA p. 137-38). Contrary to Appellant's accusations, Villegas does not state Williams made an oath "to him," nor is there any reference to any "pact." (A'nt brf. p. 13, p. 45 n. 33; A'nt COA brf. p. 137-38). The only oath by Williams in the record is the oath to tell the truth. (6CR:1728; 9CR:3091).

In 7B, Yolanda said that Mimbela told her in an unrecorded out-of-court statement that he burned a letter, and Villegas said she did not know the "philosophy of trying to get people from the street to do what you want." (A'nt COA brf. p. 138). Even assuming Yolanda accurately reported an out-of-court statement, nothing in the record indicates the contents of any letter. In 7C, Mimbela reported taking Williams to a football game, and Williams enjoyed it. (A'nt COA brf. p. 138-39). Nothing in these recordings suggests any *quid pro quo*, any attempt to improperly influence testimony, or any conspiracy.

- ***David Rangel***

Recordings 8A through 8D refer to David Rangel. In 8A, Mimbela repeats an out-of-court statement by Rangel that people blamed him for the prosecution, that he told "them" what Villegas told him, but "they" threw that away and wrote "whatever they wanted to write, and then they scared me into signing it." (A't COA brf. p. 145). In 8B, Villegas repeats what somebody else told him Rangel stated. (A't COA brf. p. 146). These corroborate Rangel's testimony about his coerced statement.

In 8C, Villegas suggests forgiveness for Rangel, because "we were all a bunch of kids back then[.]" (A't COA brf. p. 146). But in 8D, three years later, he expresses anger. (*Id*.). Appellant's brief states that Villegas became a suspect after Rangel's statement. (A't brf. p. 2). It is therefore perfectly consistent with Villegas's innocence for he and his family to blame Rangel, and be angry.

Appellant argues these recordings show Villegas was not joking or bragging when he told Rangel his "creative story," or Rangel did not think so. Nothing in them reflects such an understanding, and Appellant does not explain how any of the words stated support this interpretation.

3. Discussions of delivering a Congressman's letter of support to the prior judge, as suggested by another sitting judge.

Recordings 9A through 9C refer to the prior trial judge, Judge Bramblett. It is unsurprising that a convicted person, pursuing habeas corpus relief, would talk about the judge. Judge Ables characterized such conversations as "jailhouse talk" and "gossip." (8RR:27, 35).

Villegas received a letter of support from then-U.S. Congressman Silvestre Reyes. (8RR:35; 9RR:68). Mimbela discussed trying to make Judge Bramblett aware of it, without doing anything improper. (A'nt COA brf. 151-53). Appellant turns his statements on their head to argue they show an intent to improperly influence her.

Appellant omits important context from recording 9A. Mimbela said that another sitting judge, Judge Ricardo Herrera, advised him to deliver Reyes's letter to Judge Bramblett indirectly. Judge Herrera told him that federal agents and citizens often talk to him, advising him to look closely at particular cases. (February 8, 2010[12] at 6:46-11:31). Judge Ables affirmed that he gets these letters "all the time." (8RR:35). A probation officer suggested that the letter be delivered to Judge Bramblett's husband. Mimbela expressed his desire to avoid anything improper. (A'nt COA brf. p. 151).

[12] Conversation beginning at 19:50:50 (7:50 p.m.).

In 9B, on February 22, 2010, Mimbela was still trying to arrange a meeting. (A'nt COA brf. p. 152). Appellant points out that Judge Bramblett recused herself, and argues – with zero support in the record – that she was "forc[ed] to recuse herself" because of *ex parte* communications with Mimbela. (A'nt brf. p. 46). In fact, Judge Bramblett's order states she recused herself based on unspecified information she learned on February 19 – three days ***before*** this conversation in which Mimbela was still trying to arrange a meeting. (10CR:3467).

Recording 9C reflects Mimbela's belief that Judge Bramblett "already had her mind set," no matter "how fair she wanted to be[.]" (A'nt COA brf. p. 153). In other recordings, he expressed his satisfaction that the case would be heard an unbiased judge; and stated his impression that Judge Medrano wants the truth and justice, and "he's all about the truth," to which Villegas responded, "Thank God." (April 5, 2010 at 00:48-3:04; February 2, 2011[13] at 4:21-4:39). A person's desire to have a case heard by an open-minded, fair judge can not rationally be construed as evidence that he seeks to conceal the truth.

P. This appeal.

Appellant appeals the exclusion of recordings. (22CR:7842). Its notice of appeal recites, "The State certifies that jeopardy has not attached in this case, the appeal

[13] Conversation beginning at 16:05:36 (4:05 p.m.).

is not taken for the purpose of delay, and the evidence is of substantial importance in the case," but not that the prosecuting attorney so certifies. (22CR:7843; Appendix 3). Appellee contends that this notice fails to meet jurisdictional requirements for an interlocutory appeal. The Court of Appeals denied Appellee's motion to dismiss. *State v. Villegas*, 460 S.W.3d 168 (Tex.App.–El Paso 2015, order).

Finding no abuse of discretion, the Court of Appeals affirmed the exclusionary order. *State v. Villegas*, 506 S.W.3d 717 (Tex.App.–El Paso 2017, pet. granted). Upon review, the appeal should be ordered dismissed for want of jurisdiction. If the appeal is not dismissed, the Court should find that Appellant failed to preserve its arguments for review. If it reaches the merits, the Court should find no abuse of discretion.

SUMMARY OF THE ARGUMENT

- **There is no appellate jurisdiction**

A State's interlocutory appeal from an exclusionary order requires a personal certification by the prosecuting attorney that the appeal is not taken for delay and the evidence is of substantial importance. Appellant's notice of appeal recites that "the State," not the prosecuting attorney, so certifies. This representative-capacity statement is insufficient to confer jurisdiction.

- **The trial court did not abuse its discretion in ruling on admissibility before trial.**

Appellant's first ground for review combines two complaints. First, it argues the trial court should not have decided evidentiary objections based on Rules 402 (relevance), 403 (balancing relevance against other considerations), and 802 (hearsay) before trial. Second, it argues the trial court should not have placed the burden of proof on Appellant. Neither complaint was preserved in the trial court. For clarity of analysis, Appellee addresses these complaints separately.

Appellant's first argument appears to be that these evidentiary rulings can never be made before trial, because they require the court to hear all of the trial evidence before deciding. A trial court's discretion to rule on admissibility before trial is well-settled. Rule 104 requires preliminary hearings on admissibility outside of the jury's

presence; these hearings can be held before trial. Under Appellant's theory, no court can ever decide whether any evidence is admissible until the trial is over.

The record does not establish that the trial court placed any burden of proof on Appellant. However, if it did so, the court did not err. In a motion to exclude based on the Rules of Evidence, rather than constitutional or statutory violations, the burden is the same at a pretrial hearing as at trial. Even if the initial burden was on Villegas, his evidence – the recordings – was sufficient to show inadmissibility, shifting the burden to Appellant.

- **The trial court did not abuse its discretion in excluding recordings.**

Appellant's second ground for review claims that the Court of Appeals misapplied the standard of review. However, its argument does not describe error in its analysis; it merely regurgitates arguments that the recordings should have been admitted. Appellant misapplies the abuse-of-discretion standard, and invites appellate courts to make a *de novo* determination of admissibility.

Appellant's relevance theory hinges on a lengthy chain of unsupported assumptions, suppositions, inferences, and leaps of logic. The trial court did not abuse its discretion in finding the recordings irrelevant. Furthermore, it did not abuse its discretion in finding that any probative value is outweighed by the other considerations of Rule 403 – including prejudice from informing the jury that Villegas was convicted

and incarcerated, delay, the "mini-trial" of what was said and what was meant, Appellant's attempts to confuse the jury about the content and meaning of recordings, and distraction of the jury's attention from the crime charged to Appellant's tangential "conspiracy" accusations.

The second ground on which this Court granted discretionary review concerned relevance and Rule 403 rulings. Appellant's argument attempts to expand it, to attack hearsay rulings. The Court should not address this argument. If it does so, the Court should find no abuse of discretion. Appellant claims the statements are not offered for the truth, but failed to articulate any basis on which they were relevant if not true. It has provided no basis for admitting hearsay within hearsay. It invokes hearsay exceptions based on a claimed agency relationship and an invented conspiracy theory, but no evidence supports these theories. No abuse of discretion is shown.

The appeal should be ordered dismissed; or the judgment affirmed.

ARGUMENT

I. There is no appellate jurisdiction.

Article 44.01(a)(5) permits an appeal from an exclusionary order "if ***the prosecuting attorney certifies*** to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case[.]" TEX.CODE CRIM.PRO. art. 44.01(a)(5) (emphasis added). Noncompliance with Article 44.01 is "a substantive failure to invoke the court of appeals' statutorily defined jurisdiction." *State v. Riewe*, 13 S.W.3d 408, 411 (Tex.Crim.App. 2000), *quoting State v. Muller*, 829 S.W.2d 805, 812 (Tex.Crim.App. 1992). An appeal must be dismissed for want of jurisdiction if the certification is not filed. *State v. Redus*, 445 S.W.3d 151, 156 (Tex.Crim.App. 2014).

This requirement is intended to mandate conscientious pre-appeal analysis and careful appraisal of the likelihood of success and necessity for review; and to ensure that prosecutors do not appeal indiscriminately and clog appellate courts while leaving the defendant under the continuing cloud of criminal charges.[14] *Id*. at 154, 155 n. 14. Therefore, appeal is permitted only if "the elected prosecutor ***personally*** certifies" to the statutory requirements. *Id.* at 154 (emphasis added). "The elected prosecutor puts his

[14] This is the sort of indiscriminate appeal the statute is intended to prevent; but the verity of a prosecutor's certification is unreviewable. *Id.* at 156.

reputation and integrity, as well as his signature, on the line in filing notice of an interlocutory appeal." *Id.* at 154-55. Accordingly, "the elected prosecutor's ***personal*** certification is necessary to confer jurisdiction[.]" *Id.* at 155 (emphasis added).

The certification will normally take the form "I, John Doe, the District Attorney of XYZ County, certify that ... ." *Id.* at 156. No special form is required; but the elected prosecutor must personally vouch for the statutory elements. *Id*. Mere recitation of the statutory language is insufficient, and any inference that might be drawn from the prosecutor's signature on a notice of appeal reciting the statutory language is also insufficient. *Id.* at 157-58. In *Redus*, jurisdiction was lacking when the notice of appeal quoted the statutory language, and was signed by the prosecuting attorney; but he did not explicitly certify, or vouch for, the required facts. *Id.* at 153, 156-57.

Appellant's notice of appeal is insufficient. It says, "***The State certifies*** that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case." (22CR:7843; Appendix 3) (emphasis added). The literal text of Article 44.01 is clear, and it is construed in accordance with its plain meaning. *Muller*, 829 S.W.2d at 808. "Prosecuting attorney" is a defined term in the statute. TEX.CODE CRIM.PRO. art. 44.01(i). A certification by "the State" is not a certification by the "prosecuting attorney."

The Court of Appeals wrote that the district attorney satisfied the statute "[b]y signing the notice of appeal as the representative of the State[.]" *Villegas*, 460 S.W.3d at 170. This analysis erroneously inferred a personal certification from a representative-capacity certification. Only a personal certification satisfies the statute's purposes; and the required personal certification cannot be established inferentially. *Redus*, 445 S.W.3d at 154-57.

It was unnecessary for Villegas to file a petition for discretionary review to challenge the erroneous exercise of appellate jurisdiction; jurisdiction is a fundamental threshold issue, and cannot be conferred by consent. *State v. Roberts*, 940 S.W.2d 655, 657 (Tex.Crim.App. 1996), *overruled on other grounds, State v. Medrano*, 67 S.W.3d 892 (Tex.Crim.App. 2002). The appropriate remedy is for this Court to vacate the Court of Appeals' judgment and remand with instructions to dismiss the appeal. *Id.* at 660. The Court should order this appeal dismissed.

II. There is no reversible error in the decision to rule on admissibility before trial.

A. Appellant's objection is not preserved.

Appellant's first ground for review argues that the trial court has no discretion to exclude evidence pretrial based on Rules 402, 403, and 802. Rule 33.1 requires, as a prerequisite to appellate review, that the record show a timely objection to the trial court. TEX.R.APP.P. 33.1. This rule applies to the State. *State v. Mercado*, 972 S.W.2d 75, 78 (Tex.Crim.App. 1998). The record does not show any timely objection by Appellant. This issue is not preserved.

Appellant points to a soliloquy by an assistant district attorney – after the hearing concluded and after the trial court ruled – referring to something that he claimed occurred in chambers. He stated,

> the State had indicated to the Court that we thought it was improper for the Court -- or that the Court wouldn't be able to properly rule on the admissibility of phone calls without the context of trial, that we wanted to wait until trial to have this ruling. We just wanted to make that clear for the record that we still don't think that the Court was able to take into account the relevance of the phone calls not being in trial.

(9RR:100). This does not reflect that Appellant ever objected to a pretrial hearing or pretrial ruling based on the Rules in issue; only that its attorneys "indicated" that they "thought" the court would not be able to "properly rule" without the context of trial, and

"wanted to wait." It references relevance, but not Rule 403 or hearsay. Neither the trial court nor Villegas's attorney replied. (9RR:100).

"[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). The record does not show a timely objection presenting Appellant's present complaint to the trial court. This contention is not preserved.

B. A decision to hear evidentiary objections pretrial is not appealable.

In a footnote, Appellant states it does not "simply" attack the decision to conduct a pretrial admissibility hearing, indicating this is one of its complaints. (A'nt brf. p. 24 n. 21). However, the State may only appeal orders defined as appealable in Article 44.01. *State v. Cowsert*, 207 S.W.3d 347, 350-51 (Tex.Crim.App. 2006). A decision to conduct a pretrial admissibility hearing is not an order "grant[ing] a motion to suppress evidence," art. 44.01(a)(5), or otherwise appealable.

Appellant's footnote cites *State v. Hill*, but *Hill* was an appeal from a pretrial order dismissing an indictment, and did not discuss this issue. *State v. Hill*, 499 S.W.3d 853 (Tex.Crim.App. 2016). The decision to conduct a hearing is unreviewable.

C. Appellant's complaint regarding the pretrial hearsay ruling was not preserved for this Court's review in the Court of Appeals.

Appellant also failed to preserve for this Court's review its complaint regarding the pretrial decision to exclude recordings as hearsay, because it failed to present it to the Court of Appeals. To preserve an argument for this Court, an appellant must present it to the appellate court. *Farrell v. State*, 864 S.W.2d 501, 503 (Tex.Crim.App. 1993). In the Court of Appeals, Appellant argued that the trial court lacked discretion to exclude evidence under Rule 403 before trial, and stated (without elaboration) its position that the trial court lacked discretion to exclude evidence as irrelevant before trial. It did not mention the same argument with respect to hearsay. (A'nt COA brf. pp. 43-65). This complaint is waived.

D. The trial court did not abuse its discretion.

If the Court reaches the merits, this argument should be rejected. Article 28.01 grants a trial court discretion to hold a pretrial hearing on preliminary matters, including suppression. TEX.CODE CRIM.PRO. art. 28.01, § 1(6). Its decision to do so is reviewed only for an abuse of discretion. *Hill*, 499 S.W.3d at 865.

Rule 103 places responsibility on trial courts to conduct proceedings so as to prevent inadmissible evidence from being suggested to the jury. TEX.R.EVID. 103(d). Preliminary questions of admissibility must be determined by the court, and hearings on

preliminary matters must be conducted out of the jury's hearing. TEX.R.EVID. 104(a), (c). The word "preliminary" does not dictate when the determination is made. *Cox v. State*, 843 S.W.2d 750, 752 (Tex.App.–El Paso 1992, pet. ref'd).

Appellant cites no authority suggesting that pretrial rulings based on Rules 402 or 802 are ever inappropriate. The trial court's discretion also includes making pretrial Rule 403 rulings. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex.Crim.App. 2005). Contrary to Appellant's assertion, *Mechler* did not hold that Rule 403 objections are "rarely appropriate" for pretrial disposition. *Id*.

In *Mechler*, this Court noted factors relevant to the Rule 403 analysis, and wrote, "The fact that this Rule 403 determination occurred pretrial in the form of a motion to suppress does not alter either an appellate or trial court's use of the factors[.]" *Mechler*, 153 S.W.3d at 440. The Court recognized the possibility that in some cases, a court might not have sufficient information to make an evaluation before trial; but in that case, the court had sufficient information. *Id.* Since *Mechler*, Texas courts have continued to conduct pretrial hearings on admissibility under Rule 403. *See, e.g., Greene v. State*, 287 S.W.3d 277, 284 (Tex.App.–Eastland 2009, pet. ref'd). No Texas authority suggests that pretrial admissibility rulings under Rules 402, 403, or 802 are inherently inappropriate.

The trial court had sufficient information to make its decision. It listened to the recordings in their totality (9RR:5); this was sufficient to demonstrate their inadmissibility. It allowed Appellant to present additional evidence, although Appellant offered none. (9RR:1-98). And the trial court had extensive background information; by agreement, it took judicial notice of the prior proceedings, including the two prior trials and the habeas corpus hearings. *Villegas*, 506 S.W.3d at 731.

Furthermore, the trial court did not abuse its discretion in perceiving that it was impractical to await trial to rule. Appellant produced hundreds of hours of recordings. Deciding admissibility during trial would require recessing for days or weeks at a time to listen to them and consider their admissibility. It would force Villegas's counsel to request mid-trial breaks of days or weeks to determine which portions of hundreds of hours of recordings are appropriate to rebut excerpts offered at trial. The trial court properly exercised its "sound discretion" to decide admissibility pretrial.

Appellant repeatedly makes blanket claims that admissibility cannot be evaluated without all of the trial evidence, but points to nothing in the record to support its generalizations. It identifies no specific additional evidence that it contends was necessary for the trial court to decide, and provides no explanation for failing to offer that evidence if it was necessary. It provides no specific reason why in this case, as opposed to every case, the trial court could not decide admissibility before trial.

Nothing in the record suggests that this trial court in this case could not evaluate admissibility before trial. Appellant's generalizations provide no basis for finding an abuse of discretion.

Appellant cites cases holding that trial judges may not decide certain ultimate issues before trial, when all of the evidence is necessary to determine those issues. *Petetan v. State*, __ S.W.3d __, No. AP-77,038, 2017 WL 2839870 at *45 (Tex.Crim.App. Mar. 8, 2017) (whether defendant exempt from death penalty due to mental retardation); *State v. Iduarte*, 268 SW.3d 544, 551-52 (Tex.Crim.App. 2008) (sufficiency of evidence to support element of offense); *Woods v. State*, 153 S.W.3d 413, 415 (Tex.Crim.App. 2005) (same). These authorities are clearly distinct. They concern ultimate issues which must be evaluated based on the trial evidence as a whole. As the Court of Appeals recognized, they involve "idiosyncratic suppression orders so enmeshed with the merits of the case-in-chief that the suppression question could not be resolved pretrial, either because it would require the trial court to make a finding that evidence underpinning an element of the offense was legally insufficient (i.e., implicitly rule on guilt or innocence), or because it would require the trial court to make a credibility determination that necessarily renders an element of the crime legally insufficient." *Villegas*, 506 S.W.3d at 733. The evidentiary rulings in this case are not similar.

Unlike the findings at issue in *Woods* and its progeny, a trial court must always make evidentiary rulings before hearing all the evidence – otherwise, a court could not decide whether any evidence was admissible until the trial was over. Indeed, Appellant vaguely argues that evaluating the probative value of evidence requires a court to hear its entire "guilt-innocence case in chief" and "also the defense case." (A'nt brf. p. 26). No authority supports the proposition that a trial court may not rule on admissibility until after the trial.

Also unlike *Woods* and its progeny, as the Court of Appeals emphasized, pretrial evidentiary rulings are generally subject to reconsideration. The trial court's decision might be described as simply a "glorified motion in limine" ruling. The *Woods* line of authority does not apply, and its rationale is inapplicable to render all pretrial evidentiary rulings under Rules 402, 403 and 802 beyond the trial court's discretion.

Appellant fantasizes that if a trial judge does not approve its decision to prosecute a case, he or she will "force a dismissal" with unreasonable pretrial rulings. (A'nt brf. p. 39). This Court should not presume that any judge would ignore his or her oath of office, and should not adopt a new rule limiting discretion to make evidentiary rulings based on such a presumption. A judge who is determined to "force a dismissal" can make any number of unreviewable decisions; whereas, pretrial evidentiary rulings are appealable in appropriate cases. Appellant's flight of fantasy therefore provides no

rational basis for limiting the discretion of trial courts to make pretrial admissibility rulings.

For all of these reasons, Appellant has not shown an abuse of discretion by the trial court in ruling on admissibility before trial.

III. There is no reversible error in connection with the burden of proof.

A. This argument was also not preserved.

Appellant's first ground for review also argues the trial court erred to the extent it placed any burden of proof on the State. There was no objection and no reference at all to the burden of proof in the hearing. (9RR:1-98). Absent any record of a timely request, objection, or motion, stating its present complaint, this complaint is not preserved. TEX.R.APP.P. 33.1.

B. The record does not demonstrate that any burden of proof was placed on Appellant.

There is a simple reason Appellant did not object: The record does not demonstrate that the trial court placed any burden of proof on it. It has simply manufactured this issue to seek reversal.

The only evidence offered was the recordings, which the trial court reviewed *in camera* at Villegas's request. (9RR:5, 1-98; 22CR:7706). The parties agree that the recordings were considered and constructively admitted, for purposes of considering their admissibility at trial. A'nt COA brf. p. 49 n. 43, *citing Cornish v. State*, 848 S.W.2d 144, 145 (Tex.Crim.App. 1993). The trial court gave Appellant the opportunity to present additional evidence; this does not demonstrate that it placed any burden of proof on Appellant. This argument provides no basis for reversal.

C. If the trial court placed a burden of proof on the State, it did not err in doing so.

If the Court addresses the merits, this ground should be overruled. The burdens of proof on a motion to suppress depend on the basis of the motion. When based on a constitutional violation, the defendant has the initial burden to produce evidence defeating the presumption of proper police conduct. This shifts the burden to the prosecution to prove that no violation occurred. *State v. Robinson*, 334 S.W.3d 776, 778-79 (Tex.Crim.App. 2011). When based on a statutory violation, the burden is on the defendant to present evidence of the violation. This shifts the burden to the prosecution to prove compliance. *Id.*

However, when the motion is based on the Rules of Evidence, the same burdens applicable at trial apply. *State v. Esparza*, 413 S.W.3d 81, 86 (Tex.Crim.App. 2013) (under Rule 702). Allocation of this burden "should be no different in the context of a pretrial motion to suppress than it is when the issue is raised during the course of a trial." *Id*. Thus, once an evidentiary objection is raised, the prosecution must present sufficient evidence to overcome it. *Id*. Appellant's brief below recognized that as "the proponent of the evidence at trial, it must fulfill all required evidentiary predicates and foundations." (A'nt COA brf. p. 63). Accordingly, it carried the same burden at the pretrial hearing.

The cases cited by Appellant do not apply; all involved motions to suppress based on constitutional or statutory violations. *Robinson*, 334 S.W.3d at 778; *State v. Kelly*, 204 S.W.3d 808, 809 (Tex.Crim.App. 2006); *Pham v. State*, 175 S.W.3d 767, 769-70 (Tex.Crim.App. 2005); *Mattei v. State*, 455 S.W.2d 761, 766 (Tex.Crim.App. 1970). The trial court did not err if it placed a burden on the proponent of evidence.

Even if *Esparza* is limited to expert testimony, that does not mean Appellant had no burden. In a suppression hearing based on constitutional or statutory violations, after the defendant presents evidence of a violation, the burden shifts to the prosecution. *Robinson*, 334 S.W.3d at 778-79. If Villegas bore the initial burden, his evidence, the recordings, was sufficient to shift the burden. Appellant argues, **"Beyond the recordings**, Villegas put forth no evidence[.]" (A'nt brf. p. 38, emphasis added). But the content of the recordings demonstrates that they are hearsay, irrelevant, and any possible relevance is outweighed by other considerations of Rule 403. Villegas was not required to offer evidence "beyond the recordings" to demonstrate inadmissibility, and this proof sufficed to shift the burden. Appellant's first ground should be overruled.

IV. The Court of Appeals did not err in finding the trial court did not abuse its discretion.

A. The Court of Appeals did not misapply the standard of review; Appellant is seeking *de novo* review.

A pretrial order excluding evidence is reviewed only for an abuse of discretion. The test is whether the trial court's action was arbitrary or unreasonable. An appellate court may not reverse a trial judge whose ruling was within the zone of reasonable disagreement. *Mechler*, 153 S.W.3d at 439-40.

"Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion." *Moreno v. State*, 858 S.W.2d 453, 463 (Tex.Crim.App. 1993). Rule 403 is "inherently discretionary with the trial court," and its language "displays the drafter's intent to vest the trial courts with substantial discretion." *Mechler*, 153 S.W.3d at 439. A decision to exclude evidence as hearsay is also reviewed only for an abuse of discretion. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex.Crim.App. 2008).

Appellant's brief pays lip service to this standard, but attacks the rulings based on standards applied by a trial court in the first instance, not the deferential abuse-of-discretion standard. It does not demonstrate that the Court of Appeals applied an incorrect standard; instead, its complaint is that the trial court got it wrong. Appellant

is effectively seeking *de novo* review. The Court should not disregard the controlling standard.

B. The trial court did not abuse its discretion in excluding the recordings as irrelevant, or under Rule 403.

1. Relevance and Rule 403 standards

"In deciding whether a particular piece of evidence is relevant, a trial court judge should ask 'would a reasonable person, with some experience in the real world, believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit.'" *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990).

In determining whether to exclude evidence under Rule 403, the trial court's consideration includes the probative value of the evidence and the proponent's need for the evidence; weighed against the potential for the evidence to impress the jury in some irrational yet indelible way; its tendency to confuse or distract from the main issues; its tendency to be given undue weight by a jury; and the time needed to develop it. "Probative value" means more than relevance; it encompasses the inherent probative force of the evidence, or how compellingly it makes a fact of consequence more or less probable. "Unfair prejudice" refers to the tendency of the evidence to tempt the jury into finding guilt on grounds apart from proof of the offense, including whether it has the

potential to impress the jury in some irrational but indelible way. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex.Crim.App. 2006). The consideration of delay and distraction also considers contextual and rebuttal evidence. *Newton v. State*, 301 S.W.3d 315, 321 (Tex.App.–Waco 2009, pet. ref'd).

2. Recordings Appellant claims permit an inference of guilt.

The trial court did not abuse its discretion in excluding recordings which Appellant mischaracterizes as supporting an inference of guilt. In recording 2B, Villegas discussed prayers to get out, "even though I'm not here to tell you" – he did not say he was "not innocent." (October 12, 2011 at 16:36-17:39). Because he did not say what Appellant claims, the trial court did not abuse its discretion in finding the recording irrelevant. But even if Appellant's misstatement were true, Villegas's prayer made no reference to the crime he is accused of. (*Id*.). Even under the false transcript, the trial court in its discretion could conclude that a reasonable person, with some experience in the real world, would not find this bare reference to innocence helpful to determining a fact of consequence.

Recording 2A refers to "actual innocence" as a basis for habeas relief, not guilt or innocence of the crime. (9RR:79). Whether Villegas should have been granted habeas relief on this basis is not an issue for the jury. Recordings 2C, 2D and 2E refer to the State twisting Villegas's words, to claim he said something he did not say. These

are even further removed from relevance. With recording 2F, Appellant misinterprets an offhand comment – another inmate "wouldn't be in here if you didn't do something" – as an admission that Villegas committed murder. Nothing about this comment can reasonably be interpreted as an "admission of guilt."

None of these statements, 20 years after the shooting, refer to the circumstances of that crime. The trial court did not abuse its discretion in determining that a reasonable person, with some experience in the real world, would not find them helpful in determining any fact of consequence, and excluding them as irrelevant.

The trial court also did not abuse its discretion in excluding them under Rule 403. Appellant's only reason for offering them is to confuse the jury, by arguing that Villegas said or meant something he did not say.

With respect to probative value, even under Appellant's transcription, Villegas's repetition of his prayer did not refer to the crime he is charged with, and therefore it is not an "admission of guilt." Discussions of how an assistant district attorney twisted Villegas's earlier words have scant if any probative value. Recording 2A discusses a specific legal concept, "actual innocence" as a basis for habeas corpus relief; it is not "germane to the issue of guilt" in this prosecution. These recordings do not "compellingly" make a fact of consequence more probable, and have little if any probative value.

With respect to unfair prejudice, Appellant's argument reflects its actual intent to mislead the jury by arguing that Villegas admitted guilt of the crime charged. Admitting 2A would also require explaining to the jury the meaning of "actual innocence" for habeas corpus relief. Trying this concept to the jury would be confusing and create an irrational impression, and distract it from the indicted offense. Appellant seeks to misuse 2F to play on a prejudicial assumption that Villegas would not have been incarcerated if he didn't "do something," circumvent the presumption of innocence, and force Villegas to prove he did not commit murder.

Furthermore, admitting any of these recordings would necessarily reveal that Villegas was convicted and incarcerated. Admitting 2B, 2C, 2D and 2E would require an explanation of why Villegas prayed to "get out of here," which will inform the jury that he was convicted and incarcerated. The argument Appellant desires to make, that Villegas prayed "let me get out of here, even though I'm not innocent [*sic*]," necessarily reveals that he was previously convicted. Admitting 2A would require revealing that Villegas was previously convicted, to explain why he was pursuing habeas corpus relief. Admitting 2F, stating a different prisoner wouldn't be "in here" if he didn't "do something" would require revealing that Villegas was "in here," *i.e.*, in jail. The prior conviction and incarceration of Villegas are highly prejudicial and inadmissible. *See Theus v. State*, 845 S.W.2d 874, 881-82 (Tex.Crim.App. 1992) (previous conviction for

same type of offense can be highly prejudicial); *Casey v. State*, 349 S.W.3d 825, 835 (Tex.App.–El Paso 2011, pet. ref'd) (defendant's incarceration "was certainly prejudicial and inadmissible"); TEX.R.APP.P. 21.9(d) (prohibiting reference to previous conviction on retrial).

Additionally, admitting these recordings will force a "mini trial" on what Villegas said and meant. It will require testimony from court reporters about transcriptions, and possibly expert witnesses about recordings. Admitting a recorded discussion of "actual innocence" for habeas corpus will require re-trying the habeas corpus proceeding to the jury. The trial court properly considered the time needed to develop this evidence, during which the jury would be distracted from considering the offense charged. The trial court did not abuse its discretion in excluding these recordings.

3. References to witnesses.

Recordings 3A through 8D generally refer to attempting to locate witnesses or obtain their testimony. Appellant largely attempts to admit them under a "consciousness of guilt" theory, claiming that they show a conspiracy to tamper with witnesses, from which it infers that Villegas knew he was guilty. Appellant has never identified the parties to this alleged conspiracy, and record contains no evidence of any conspiracy. The trial court did not abuse its discretion in concluding that Appellant's conspiracy

theory requires such a lengthy chain of assumptions, suppositions, inferences, and leaps of logic that the recordings are properly excluded under Rules 402 and 403.

Criminal acts designed to reduce the likelihood of prosecution, conviction, or incarceration may be admissible as evidence of guilt, as an exception to Rule 404(b). *Ransom v. State*, 920 S.W.2d 288, 299 (Tex.Crim.App. 1994). However, the consciousness-of-guilt exception does not require admission of evidence when the proponent must stack inference upon inference to establish an attenuated theory of relevance. *Nolen v. State*, 872 S.W.2d 807, 812 (Tex.App.–Fort Worth 1994), *pet. ref'd*, 897 S.W.2d 789 (Tex.Crim.App. 1995).

In *Nolen*, the defendant was charged with possession of methamphetamine. To prove the defendant knew that it was a controlled substance, the State introduced evidence of a previous burglary conviction involving theft of glassware typically used in manufacturing drugs. Its theory was the defendant previously stole glassware used in drug production; therefore, he had knowledge of the contraband and its production; therefore, he knew he was possessing contraband in the offense charged. The Court held this chain of inferences was too attenuated, and the trial court abused its discretion in admitting the prior conviction. *Nolen*, 872 S.W.2d at 812. The chain of inferences, assumptions, and speculation argued by Appellant is even more attenuated than in *Nolen*.

Appellant's theory requires speculation that Mimbela contacted witnesses, offered them benefits, or made them aware of a reward offer to change their testimony, rather than to learn what their testimony would be and obtain information leading to the real killer. There is no evidence to support this speculation; it contradicts what is stated in the recordings, that he was trying to find the truth and looking for the real killer. There is nothing in the record demonstrating any *quid pro quo* with any witness; and nothing to suggest that any exchange involved false testimony. Villegas did not meet with the witnesses, Mimbela did. To consider these events as evidence of Villegas's state of mind therefore requires an assumption that Villegas was able to control Mimbela. Nothing in the record supports this assumption. Appellant's theory also requires assuming that Villegas knew about Mimbela's intent to offer benefits for favorable testimony; but the recordings generally report past events, not planned events. This chain of unsupported inferences and speculation is necessary to lead to the final inference Appellant desires, that Villegas caused Mimbela to offer benefits in exchange for altered testimony because Villegas himself believes he is guilty.

Talking about finding a potential witness, discussing possible testimony, or hoping a witness will identify the true perpetrator is not conspiring to tamper with that witness's testimony. The trial court did not abuse its discretion in excluding these recordings as irrelevant.

The trial court also did not abuse its discretion in rejecting other relevance theories asserted. Appellant argues the recordings somehow rebut a defensive theory that the Flores brothers were alternative perpetrators. Villegas was not present at the time of the shooting, so he has no personal knowledge of whether Rudy or Javier was the killer. His personal opinion of their personalities sheds no light on whether they were the true perpetrators. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find the recordings helpful in determining whether they committed the crime.

Appellant argues the recordings rebut a defensive theory because they show Villegas was not joking or bragging when he told Rangel his "creative story," or Rangel did not think so. Nothing in the recordings reflects such an understanding, and Appellant's brief does not explain how they could do so. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find these recordings helpful in determining any fact of consequence.

The trial court also did not abuse its discretion in excluding the recordings under Rule 403. If they have any probative value, it is slight – references to various witnesses do not compellingly suggest that Villegas was "conscious of guilt," or any other relevant fact. However, admitting them in support of Appellant's theory will hijack the trial of this homicide prosecution and turn it into a trial of Villegas and unspecified others for

conspiring to commit witness tampering. The trial court did not abuse its discretion in perceiving that there is potential for unfair prejudice and for tempting the jury into finding guilt for a reason other than evidence of the charged offense; and that trying that accusation will unnecessarily delay the proceedings.

In addition, admitting the recordings will cause the jury to perceive that Villegas was previously convicted and incarcerated. Appellant's theory that Villegas is angry at Williams and Gonzalez because he was in prison cannot be presented without revealing that Villegas was convicted and incarcerated. Explaining why Villegas and his family members may have been angry with Rangel would necessarily reveal that he was convicted. Explaining why Villegas was discussing the possible testimony of witnesses would require explaining the habeas corpus proceedings, which necessarily involves disclosing the conviction. Mimbela got involved only because he came to believe Villegas had been wrongly convicted. (19CR:6839). There is no way to explain his discussions of witnesses, and respond to Appellant's conspiracy theory, without explaining why Mimbela is involved, necessarily revealing the conviction. This is inadmissible and obviously prejudicial. TEX.R.APP.P. 21.9(d).

The trial court did not abuse its discretion in excluding these recordings.

4. References to the prior judge.

Recordings 9A, 9B and 9C refer to the former judge. The trial court did not abuse its discretion in finding that a reasonable person, with experience in the real world, would not find Mimbela's impression of Judge Bramblett or desire to make her aware of Congressman Reyes's support, as suggested by another sitting judge, helpful to determining any fact of consequence to the prosecution of Villegas.

Appellant's "consciousness of guilt" theory depends on a chain of inferences and speculation: It requires speculation that Mimbela was committing some wrongdoing by attempting to make Judge Bramblett aware of Congressman Reyes's support, even though Judge Herrera encouraged this course of action. It requires speculation that Mimbela believed such action would result in Judge Bramblett deciding the case on anything other than the merits, instead of encouraging her to keep an open mind, as Judge Herrera suggested. Nothing in the record supports this speculation. Villegas did not engage in the conduct, Mimbela did. Thus, for Mimbela's attempt to communicate with the judge to have relevance also requires speculation that Villegas had some ability to control Mimbela to contact Judge Bramblett. Nothing in the record establishes this control. All of these leaps are necessary to reach Appellant's final inference that Villegas's consciousness of his own guilt motivated him to cause Mimbela to attempt to influence Judge Bramblett to decide the case on some basis other than the merits. The

trial court did not abuse its discretion in concluding that a reasonable person, with some experience in the real world, would not find these recordings helpful in determining any fact of consequence.

The trial court also did not abuse its discretion in excluding them under Rule 403. Any possible probative value of recordings describing Mimbela's opinion of Judge Bramblett or attempt to make her aware of Congressman Reyes's support, which did not discuss the offense with which Villegas is charged, is slight. They do not compellingly suggest that Villegas committed the murders, is conscious of his guilt, or any other relevant fact. However, admitting them will hijack the murder trial and turn it into a trial of Villegas or Mimbela for conspiring to influence Judge Bramblett, and even worse, a trial on whether the judiciary can be so easily influenced. Admitting them will require Villegas to dedicate time to introducing recordings establishing that he wanted a fair judge, instead of a judge who had her mind made up. The trial court did not abuse its discretion in perceiving that there is a potential for unfair prejudice and for tempting the jury into finding guilt for a reason other than evidence of the charged offense, and that the proceedings will be unnecessarily delayed while Appellant's accusations unrelated to the merits are tried. Admitting these recordings will require some explanation to the jury of the role of Judge Bramblett, which will cause the jury to perceive that Villegas was previously convicted before her, which is inadmissible and obviously prejudicial.

TEX.R.APP.P. 21.9(d). The trial court did not abuse its discretion in excluding these recordings.

C. The grounds presented by Appellant do not provide a basis for reviewing hearsay rulings.

Appellant's brief argues the Court of Appeals erred in upholding the trial court's hearsay rulings. (A'nt brf. p. 50-59). However, its grounds for review do not state a basis for reviewing the merits of those rulings. (P.d.r. p. 1; A'nt brf. p. 1). The Court should not address this argument, and the hearsay rulings should be left undisturbed. *See* TEX.R.APP.P. 68.4(g).

To circumvent this omission, Appellant characterizes the decision as affirming a "relevance determination on the basis of ... hearsay." (A'nt brf. p. 50). But obviously, relevance and hearsay are different rules. Hearsay is inadmissible regardless of whether it is "relevant" hearsay. *See Bigby v. State*, 892 S.W.2d 864, 888 (Tex.Crim.App. 1994) ("Because the written statement was inadmissible hearsay, we need not address appellant's argument that the document was relevant."). Appellant's grounds provide no basis for reviewing the hearsay rulings.

D. The trial court did not abuse its discretion in excluding hearsay.

If the Court reaches the hearsay argument, it should find no error in the Court of Appeals' conclusion that the trial court did not abuse its discretion.[15] Many of the statements are "double hearsay" or "hearsay within hearsay," i.e., repetition of unrecorded out-of-court statements.[16] Such a statement is inadmissible unless a hearsay exception is established for the statement repeated. TEX.R.EVID. 805; *Sanchez v. State*, 354 S.W.3d 476, 485-86 (Tex.Crim.App. 2011). Appellant has never offered any basis for admitting "hearsay within hearsay."

Appellant argues some or all of the recordings were "not offered for the truth." However, in the trial court, Appellant stated only that one question in one recording had "no truth value," after the trial court had already ruled (9RR:98), and did not argue that any others were not offered for the truth. (9RR:1-98). The Court of Appeals correctly found this contention waived. TEX.R.APP.P. 33.1.

Even if preserved, the mere "assertion by the proponent of an out-of-court statement that it is offered for some purpose other than to prove the truth of the matter

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[15] Appellant seems to argue that Villegas did not object based on hearsay. Villegas repeatedly stated hearsay objections. (9RR:34, 36, 44, 51, 58, 64, 71, 76, 77, 94; 8RR:34). Appellant never asserted in the trial or appellate court that hearsay was not in issue, nor that it was unprepared to establish a hearsay exception, nor that the trial court erred because there was no hearsay objection.

[16] Recordings 3C, 3E, 3F, 4B, 4D, 4E, 5C, 5D, 5G, 7B, 8A, 8B, 9C.

asserted does not render the statement automatically admissible." *Miller v. State*, 2003 WL 253326 at *1 (Tex.App.–Waco 2003, pet. ref'd) (not desig. for publication) (citation omitted); *see DuBose v. State*, 774 S.W.2d 328, 329 (Tex.App.–Beaumont 1989, pet. ref'd). It is incumbent on the party propounding an out-of-court statement to articulate how it is relevant apart from the truth of the matter asserted, not just claim it is not offered for the truth. *Moreno*, 858 S.W.2d at 465.

Appellant fails to provide this explanation. An out-of-court statement is offered to prove the truth of the matter asserted, if it is relevant only to the extent the factfinder believes it true. *Cardenas v. State*, 971 S.W.2d 645, 650 (Tex.App.–Dallas 1998, pet. ref'd). The hearsay recordings have no relevance unless believed to be true. For example, 3A describes Mimbela's efforts to find an individual who Appellant identifies as Wayne Williams. (A'nt COA brf. p. 86-87). Appellant argues it is offered to show an attempt to influence his testimony, but this theory requires a belief that Mimbela's statements were true: If he was not trying to find Wayne Williams, the statements have no relevance under Appellant's theory. Because relevance depends on the truth of the matter asserted, the statements are hearsay.

To avoid the hearsay rule, Appellant argues that Mimbela and others are either Villegas's agents, or he adopted their statements, or they are co-conspirators. The proponent bears the burden to establish these hearsay exclusions. *Alvarado v. State*, 912

S.W.2d 199, 215 (Tex.Crim.App. 1995); *Meador v. State*, 812 S.W.3d 330, 333 (Tex.Crim.App. 1991)

For the co-conspirator exclusion, the proponent must show that a conspiracy existed, and that the opposing party and the declarant were members. *Guidry v. State*, 9 S.W.3d 133, 148 (Tex.Crim.App. 1999). The proponent cannot rely only on the statements themselves; "Where there is sufficient ***independent evidence*** to establish a conspiracy, hearsay acts and statements of a conspirator which are made during the course of and in furtherance of the conspiracy are admissible against another conspirator." *Deeb v. State*, 815 S.W.3d 692, 696 (Tex.Crim.App. 1991) (emphasis added, citations omitted). Appellant offered no such evidence. (9RR:1-98).

To prove a conspiracy, Appellant was required to prove the intent that a felony be committed, an agreement between co-conspirators to its commission, and performance of an act in furtherance of the agreement. *Williams v. State*, 646 S.W.2d 221, 222 (Tex.Crim.App. 1983); *see Agyin v. State*, 2013 WL 5864483 at *4 (Tex.App.–San Antonio 2013, pet. ref'd) (memo. op.) (following Penal Code elements in applying Rule 801). There is no evidence of these elements.

Appellant also did not establish other elements of the co-conspirator exclusion. The Rule limits the exclusion to statements made during the course of, and in the furtherance of, the conspiracy. *Byrd v. State*, 187 S.W.3d 436, 440 (Tex.Crim.App.

2005); TEX.R.EVID. 801(e)(2)(E). These are separate elements. *Guidry*, 9 S.W.3d at 148. Statements after the objectives of the conspiracy have failed or been achieved are not "during" the conspiracy. *Byrd*, 187 S.W.2d at 440-42 & n. 7. Appellant has not shown when the alleged conspiracy began and ended. Statements in furtherance of a conspiracy must be calculated to advance its objectives, not merely descriptions of what occurred. *Guidry*, 9 S.W.3d at 148. Appellant does not explain how the statements advanced any objectives of any conspiracy. For all of these reasons, Appellant's conspiracy theory fails.

Appellant argues that Mimbela was Villegas's agent. To be an agent, a person must work for a principal and be subject to his control. *Ackley v. State*, 592 S.W.2d 606, 608 (Tex.Crim.App. 1980). This test has been applied specifically under Rule 801. *Farlow v. Harris Methodist Fort Worth Hosp*., 284 S.W.3d 903, 927-28 (Tex.App.–Fort Worth 2009, pet. denied); *Vahlsing Christina Corp. v. Ryman Well Serv., Inc*., 512 S.W.2d 803, 812 (Tex.Civ.App.–Corpus Christi 1974, writ ref'd n.r.e.). Federal courts interpret Federal Rule of Evidence 801 the same way. *Ramsey v. Gamber*, 469 Fed.Appx. 737, 741 (11th Cir. 2012). There is no evidence that Villegas had any right to control Mimbela. (9RR:1-98). His statements are inadmissible.

Furthermore, agency status alone is not sufficient to establish this exclusion. The statements must be made on a matter within the scope of the agency, while it existed.

TEX.R.EVID. 801(e)(2)(D). Nothing in the record establishes these elements. Appellant's agency theory does not show an abuse of discretion.

Appellant also argues that some statements should be admitted as adoptive admissions, which excludes from hearsay statements that an opposing party "manifested that it adopted or believed to be true." TEX.R.EVID. 801(e)(2)(B). It provides little explanation of this argument, apart from its own characterization of his tone or emotions. The trial court listened to the recordings, and had the opportunity to consider Villegas's tone and inflection as well as the words used. (9RR:5). It did not abuse its discretion in concluding that Villegas's muted reactions to others' statements, generally such innocuous comments as "yeah" and "alright," fail to manifest that he adopted or believed the truth of those statements. TEX.R.EVID. 801(e)(2)(B).

For all of these reasons, the trial court did not abuse its discretion. If the Court reaches the merits, Appellant's arguments should be rejected.

PRAYER

Appellant relies on mischaracterizations and unsupported accusations. The trial court did not abuse its discretion. The appeal should be dismissed, or the trial court's orders affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that this pleading was served on **Jaime Esparza**, El Paso District Attorney, Attn: **Lily Stroud** (lstroud@epcounty.com), and **Tom Darnold** (tdarnold@epcounty.com), Assistant District Attorneys, Attorneys for Appellant; and to the **State Prosecuting Attorney** (information@SPA.texas.gov); on September 7, 2017, by electronic service.

/s/ John P. Mobbs
John P. Mobbs

WORD-COUNT CERTIFICATE

This brief contains 14,992 words, excluding the parts of the brief exempted by Tex.R.App.P. 9.4(i)(1), based on the word-count function of the undersigned counsel's word-processing program (Wordperfect X4 ver. 14.0.0.603).

/s/ John P. Mobbs
John P. Mobbs

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0053-17

THE STATE OF TEXAS,

Appellant,

v.

DANIEL VILLEGAS,

Appellee.

Appealed from the 409th Judicial District Court
And the Court of Appeals for the Eighth District of Texas
El Paso, Texas

APPENDIX OF APPELLEE
DANIEL VILLEGAS

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1 August 16, 2012 Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus (13CR:4378-4455).

2 Nov. 3, 2014 Findings of Fact and Conclusions of Law on Motion to Suppress (22CR:7683-98).

3 State's Notice of Appeal (22CR:7842-44).

APPENDIX 1

IN 409th DISTRICT COURT
OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS	§	
	§	
VS.	§	**CAUSE NO. 76187-41-1**
	§	
DANIEL VILLEGAS	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ON THIS THE 16TH DAY OF AUGUST, 2012, Comes the 409th District Court and after hearing and consideration of all evidence presented, all submissions, affidavits, the transcripts of the two prior trials, as well as all other evidence before this Court in this matter, submits to the Court of Criminal Appeals the following Findings of Fact And Conclusions of Law:

I. FINDINGS OF FACT

A. Findings of Fact Related to the Investigation of the Double Homicide of Armando Lazo and Robert England.

1. Shortly after midnight on April 10, 1993, Jesse Hernandez, Juan Medina, Armando Lazo, and Robert England were walking home from a party on Jamaica Street in El Paso, Texas. They reached the intersection of Transmountain Road and Electric Street, seventeen-year-old Lazo and eighteen-year-old England were struck and killed by gunfire originating from the passenger side of a vehicle on Electric Street. Hernandez and

Medina were not struck. (WH Pet. Ex. 43, 46; T1 12/7/94, 16, 121, 126).[1]

2. Robert England suffered a single gunshot wound to the head and died shortly thereafter. His body was discovered approximately 148 feet from six .22-caliber bullet casings that were later found grouped together on Electric Street. (T1, 12/7/94, 73-74, 97-98, 108-10, 186-88).

3. Armando Lazo was shot once in his abdomen and once in his thigh, with both bullets entering the front of his body. His body was found on the doorstep of the corner home belonging to George and Nancy Gorham, directly behind from where the shots originated. The Gorhams called 911 at 12:18 a.m. after hearing five or six consecutive gunshots and the sound of someone knocking at their front door. They did not report hearing a second round of shots fired after the initial five or six. Except for the cluster found on Electric Street, no shell casings were found near the Gorhams' door or anywhere else in the vicinity. (WH, 9/8/11, 114, 130-33; WH Pet. Ex. 32a-31, 61; T1, 12/7/94, 48).

4. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. (WH, Pet. Ex. 30, 35, 43).

5. Just hours after the shooting, in an investigative interview conducted by Detective Arbogast of the El Paso Police Department, Juan Medina told the police the following:

    a. As the four boys were walking down Transmountain Road, a car approached them, stopped, backed up, moved forward, and stopped again. Believing that the car belonged to a friend of theirs named Hector Ochoa whom they had just seen at the party, the boys

[1] Citations to the record appear with an abbreviation for the proceeding, followed by the date of testimony and the corresponding page number. A citation to WH, 6/21/11, 40, for instance, refers this Court to page 40 of the portion of the Writ Hearing held on June 21, 2011. Similarly, T1 refers to Daniel Villegas' first trial in December 1994, T2 refers to Villegas' second trial in August 1995, and SH refers to the Pre-trial Motion to Suppress hearing held in December 1994. Citations to different documents in the record are separated by semicolons.

approached the vehicle; the car, however, continued this cat-and-mouse pattern until it eventually drove off. (T1, 12/7/94, 11, 14).

b. Shortly thereafter, as the four boys were walking on Electric Street, the same car approached, parked on the wrong side of the street, and turned off its lights. When the four boys again approached the car, shots were fired from the car's passenger side. Medina and Hernandez began running as the gunshots continued and were not struck. (T1, 12/7/94, 13-16).

c. Medina told Detective Arbogast that he could not identify the shooter or any other individuals in the car. (T1, 12/7/94, 15-16).

6. That same day, April 10, 1993, the other surviving victim, Jesse Hernandez, was interviewed at Police Headquarters by Detective Alfonso Marquez of the El Paso Police Department, who was leading the investigation. During this interview, Hernandez described facts about the events leading up to the shooting similar to the facts that Medina relayed, and also stated that he could not identify the shooters. Hernandez added that the car in question was red or maroon. (WH, 6/22/11, 20-22, 24-25, 31-32, 37, 52-53; WH 9/8/11, 24; WH Pet. Ex. 24).

7. On April 10th, 1993, later in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. This weapon was never tested against the .22-caliber casings recovered from the Electric Street shooting earlier that day. The recovered weapon was destroyed by the El Paso Police Department five (5) years after it was taken into evidence. (WH, 9/8/11, 135-43; WH, Pet. Ex. 50).

8. On April 12, 1993, Jesse Hernandez was brought back to the police station by Detective Marquez for further questioning, where the following occurred:

a. Detective Marquez asked Hernandez to write out a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told

him to "just cut the bullshit," and threw the statement back at Hernandez. (WH, 6/22/11, 54).

b. Detective Marquez accused Hernandez of killing his friends and lied to him by telling Hernandez that Juan Medina had already implicated him. (WH, 6/22/11, 54).

c. Detective Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty. (WH, 6/22/11, 55).

d. Hernandez did not confess to the crime. However, during the evidentiary portion of this writ hearing, Hernandez testified that he was close to confessing to the killing of his friends based on Detective Marquez's interrogation.

9. Shortly after the shooting, Tonya Vinson, Terri Vinson, Charles Blucher, and Terrance Farrar all contacted the police to alert them that they believed Rudy and/or Javier Flores were responsible for shooting Lazo and England. (WH, Pet. Ex. 43).

10. At 4:25 p.m. on April 14, 1993, Javier Flores gave a statement to the police indicating that he lived with Rudy Flores, and that when Javier arrived home at approximately 12:30 a.m. on the evening of the Electric Street shooting, Rudy was not home. (WH, Pet. Ex. 35).

11. Approximately one-and-a-half hours later on April 14, 1993, Detective Marquez took a statement from Rudy Flores, which included the following information:

a. Rudy Flores drove past the same party the victims were at on Jamaica Street at approximately 11:00 p.m. on the night of the murder.

b. At around midnight, Rudy Flores was in a car traveling east on Transmountain Road.

c. Between 12:15-12:20 a.m., Rudy Flores was in the same car near Transmountain and Electric Street (the location of the shooting).

d. Rudy Flores claimed he then went home. His home was located just one or two minutes away from the scene of the Electric Street shooting.

(WH, Pet. Ex. 34). This information placed Flores at the scene of the crime at the time of the shooting, which occurred shortly before the Gorhams called 911 at 12:18 a.m.

12. On April 15, 1993, based on a tip, Detective Marquez participated in the arrest, transport from New Mexico to El Paso, and subsequent questioning of fifteen-year-old Michael Johnston. The circumstances of this questioning were as follows:

a. Detectives Marquez and Graves interrogated Michael Johnston for eight hours from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993.

b. Johnston was handcuffed during the entire eight hours and was unaccompanied by his parents.

c. Detective Marquez accused Johnston of shooting Lazo and England and lied to him that Johnston's friend had implicated him.

d. Detective Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself.

e. Detective Marquez further threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess.

f. Johnston confessed to shooting Armando Lazo and Robert England.

g. Johnston was never charged with this offense. Detective Marquez later admitted that Johnston's confession was false. (T1, 12/8/94, 312, 317; T1, 12/9/94, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

13. During the investigation, several other individuals confessed to or boasted of committing the Electric Street shooting but were not charged,

including Rick Martinez, Eddie Valles, and Jacob Jarequi. (T1, 12/8/94, 317; WH, 9/14/11, 29; WH, Pet. Ex. 43).

14. On April 21, 1993, the El Paso Police Department contacted Patricia Rangel, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint that had been filed against him and threatening her with obstruction of justice if she did not cooperate. (T1, 12/9/94, 696). David Rangel is Daniel Villegas' cousin. Rangel was subsequently picked up by investigating detectives and questioned at the police station by Detectives Marquez and Lozano. (T1, 12/8/94, 146; WH, 6/22/11, 113). The circumstances of this questioning were as follows:

    a. David Rangel was never questioned about a telephone harassment complaint. The sole topic discussed was the shooting on Electric Street.

    b. Detective Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting.

    c. Detective Marquez threatened Rangel with life in prison if he did not confess and warned him that he was a "pretty white boy with green eyes" who could expect to be "fucked" in prison.

    d. During the questioning, David Rangel told the detectives that during a telephone call with his cousin Daniel Villegas and Marcos Gonzalez, Villegas admitted to shooting at the victims on Electric Street with a shotgun. Rangel told the detectives that Villegas and Gonzalez were laughing during the conversation and Rangel believed Villegas was joking.

    e. Rangel testified he wrote a statement documenting this phone call with Villegas and Gonzalez, wherein he noted that Villegas had admitting shooting at the victims with a sawed-off shotgun.

    f. Detective Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun.

g. Rangel testified that Detective Marquez ordered him to sign another statement that purported to document the phone conversation but that did not mention the type of gun used. Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just [wanting] to get out of there." (WH, 6/22/11, 118-36).

15. David Rangel's signed statement documenting Villegas' purported involvement included several facts that are directly contradicted by other evidence in this case, including:

    a. That Villegas was in a black car, whereas the surviving eyewitness victims variously described the car as red, maroon, or "goldish." (WH, Pet. Ex. 24, 26, 51).

    b. That Villegas shot Lazo once, saw Lazo run to a nearby home, and then "chased him to the house and there shot him again," even though no shell casings were recovered near Lazo's body or anywhere else other than the location on Electric Street from which Hernandez and Medina said the shots originated. (WH, Pet. Ex. 26; WH, 9/8/11, 212-14).

    c. That on the initial drive-by, Villegas ordered one of the victims to stop, at which point the victim stopped and "threw his gang sign" at Villegas. Surviving eyewitnesses Jesse Hernandez and Juan Medina did not describe any verbal exchange or hand gestures on the initial encounter. (WH, Pet. Ex. 26, T1, 12/5/94, 38-39).

    d. That Villegas chased Lazo down and personally shot him again, which directly conflicts with Villegas' purported confession, in which he said someone else shot Lazo the second time. (WH, Pet. Ex. 26).

16. On April 21, 1993, fifteen-year-old Rodney Williams was questioned by El Paso Police. Detective Earl Arbogast was the first to question Williams; he concluded his questioning after determining Williams had nothing relevant to add to the investigation. (WH, 6/21/11, 26; WH, 6/23/11, 10-11).

17. Detective Graves then began questioning Williams. The circumstances of this questioning were as follows:

    a. Fifteen-year-old Williams was alone and without counsel during the five-to-six hour interrogation. He asked to see his mother but Detective Graves refused these requests.

    b. Detective Graves insisted that he knew Williams was involved and present when Villegas shot Lazo and England on Electric Street; Williams maintained that neither he nor Villegas were involved.

    c. Williams told Detective Graves that he and Villegas had been watching movies at the Village Green apartment complex on the night of the murders.

    d. Detective Graves threatened that, if Williams did not admit his involvement, he would be charged and go to jail. He told Williams that he would be raped so often and so brutally that his rectum would enlarge and he would not be able to "fart."

    e. Detective Graves promised Williams he could go home if he did give an inculpatory statement. Detective Graves also promised Williams that they wanted to prosecute Villegas, and they were not interested in going after Williams.

    f. Williams signed a typed statement prepared by officers, despite the fact that the information in the statement was untrue. (WH, 6/23/11, 13-30; T1, 12/8/94, 250-51).

18. The statement Rodney Williams signed contained the following details relating to the homicides on Electric Street:

    a. Williams, Villegas, and Marcos Gonzalez were at the Village Green Apartments during the late evening hours of April 9, 1993 when "Popeye" and "Snoopy" picked them up in a white, mid-sized car. Popeye then drove the five boys around the area.

b. Thereafter, Villegas and Gonzalez got out of the car and stole a case of Budweiser beer (i.e., "a beer run") from a Diamond Shamrock, which the five boys then drank together.

c. Sometime thereafter, with Popeye still driving the car, they approached a group of four boys walking on Transmountain Road. Popeye yelled "Que Barrio?", at which point two of the boys approached the car and started yelling in response. Popeye then drove off.

d. Fifteen minutes later, Popeye drove up to the same group of boys, handed Villegas a gun, and Villegas shot at the boys. One fell down right away, while the others ran away. Williams stated that he believed that another was shot in the back as he was running away. (WH, Pet. Ex. 29).

19. After signing the statement, Rodney Williams was arrested for capital murder, but charges against him were dropped after the prosecutor announced in open court that they had insufficient evidence to charge him. (WH, 6/23/11, 35, 38; T1, 12/8/94, 253-54).

20. Shortly after 10:00 p.m., on April 21, 1993, Detectives Marquez and Arbogast entered the Villegas home armed with an arrest warrant obtained approximately forty minutes earlier for Marcos Gonzalez. Gonzalez, an adult, was placed under arrest and read his rights. As the detectives were leaving, Daniel Villegas asked them why they were arresting Gonzalez. After learning the identity of Villegas, Detective Marquez placed him under warrantless arrest and read him the same rights. Villegas was sixteen years old at the time. (WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; SH, 130, 227).

21. Villegas and Gonzalez were placed in different police cars. Both police cars then drove past the home of Fernando Lujan, who is known by the nickname "Droopy." The officers specifically pointed this house out to Villegas. (WH, 9/15/11, 29-30; SH, 12/1/94, 158).

22. While in the car, officers asked Villegas if he knew someone named "Snoopy," and Villegas said he did not. (WH, 9/15/11, 30).

23. Both of the police cars then drove to Northpark Mall. While Villegas and Gonzalez stayed in the police cars, the officers met and spoke to each other. (WH 9/15/11, 31; SH 12/1/94, 152, 223).

24. After this meeting, both Gonzalez and Villegas were driven directly to the El Paso Police Headquarters. During this drive, Villegas repeatedly informed Detective Marquez that he was a juvenile. Detective Marquez accused Villegas of lying about his age. About 10-15 minutes after arriving at Police Headquarters, Detective Marquez confirmed that Villegas was, in fact, just sixteen years old. At that point, Detective Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services, which is a "juvenile processing office" pursuant to Tex. Fam. Code §52.05(a). (WH, 9/15/11, 31, 33; SH, 12/1/94, 224-25).

25. Marcos Gonzalez, an eighteen-year-old, remained at Police Headquarters, where he was questioned by Detective Graves. The circumstances of this questioning were as follows:

    a. Gonzalez testified that Detective Graves threatened to beat him if he did not confess to the Electric Street shooting. Detective Graves also promised to put Gonzalez in county jail where he would be "screwed by fat, old men" unless he confessed.

    b. Detective Graves promised Gonzalez that he was only interested in going after Villegas for the killings.

    c. Gonzalez testified that when he refused to confess, Detective Graves slammed him against the wall repeatedly.

    d. At 1:15 a.m., Gonzalez signed a statement typed by law enforcement. (T1, 12/8/94, 433, 436, 446, 452, 489; SH, 12/30/94, 41; WH, Pet. Ex. 56).

26. Marcos Gonzalez's signed statement contained the following details relating to the homicides on Electric Street:

    a. Gonzalez and Williams were outside Williams' apartment on the evening of the shooting "kicking back." A beige, two-door car approached them. "Snoopy" was driving the car, "Popeye" was in

the front passenger seat, and Villegas was in the back. Gonzalez and Williams got in the back of the car.

b. They then stopped at a 7-Eleven, where Popeye went on a "beer run," stealing four twelve-packs of Budweiser.

c. The group drank approximately three of the twelve-packs while driving around. Eventually, they passed a group of four or five teenage boys walking on Transmountain Road.

d. Popeye and Villegas yelled "VNE Putos" at the boys, and the other group yelled something back. Snoopy then drove off toward his home, saying he wanted to go get his gun.

e. Snoopy pulled up outside his house and went in, returning a short time later with a small black automatic gun.

f. As they drove back toward Transmountain Road, Gonzalez asked to be let out of the car. Snoopy did so, but not before Popeye called him a "pussy" and Gonzalez hit him.

g. Gonzalez walked home and went to sleep. Later, Villegas told Gonzalez that he had shot and killed Armando Lazo. (WH, Pet. Ex. 56).

27. Detective Marquez arrived with Villegas at the Juvenile Investigative Services office at approximately 11:00 p.m. Villegas was placed in a room and handcuffed to a chair by Detective Marquez. (SH, 227; WH, 6/21/11, 42-43; WH, 9/15/11, 33-35; WH, Pet. Ex. 5).

28. Villegas signed a juvenile *Miranda* warning card in front of Detective Ortega after arriving at the office at 11:15 p.m. (WH, 6/21/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

29. Villegas was questioned by Detective Marquez while at Juvenile Investigative Services. Villegas testified at the evidentiary hearing to the following:

a. Villegas remained handcuffed to a chair while he was questioned for about an hour.

b. Detective Marquez repeatedly accused Villegas of committing the Electric Street shooting, telling him that Rodney Williams had implicated him.

c. Detective Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and fucked by a bunch of fat faggots."

d. Detective Marquez also threatened to "kick his ass" and to take him to the desert and beat him if he did not admit to the shooting.

e. When Villegas maintained his innocence, Detective Marquez slapped him. Villegas had never been interrogated before and was "terrified out of his mind." (WH, 9/15/11, 35-36; T1, 12/12/94, 813-18).

30. Villegas was next handcuffed and taken to the Juvenile Probation Department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to "give a confession." (WH, 6/21/11, 212; SH, 11/30/04, 20; WH, Pet. Ex. 6).

31. Officer Aguilera met privately with Villegas, at which point Villegas agreed to give a statement. (WH, 6/21/11, 224).

32. Villegas was next taken before Magistrate Carl Horkowitz, who was required to warn him of his rights prior to any interrogation.

33. Prior to this meeting, Villegas testified that Detective Marquez warned Villegas that if he did not agree to give a statement, he would beat him and put him in jail. Specifically, Detective Marquez threatened: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, motherfucker. I am going to take you to the desert and beat your ass." (WH, 6/21/11, 56-57; WH, 9/15/11, 39).

34. At 12:53 a.m., Villegas did tell Magistrate Horkowitz that he would give a statement. Villegas testified that he did so only because he was "mentally paralyzed" by Detective Marquez's continual threats. (WH 9/15/11, 38-39).

35. Villegas was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned once again by Detective Marquez. Villegas also testified that after being told by Marquez that Williams had already implicated him, Villegas then told Detective Marquez the following while Detective Marquez typed into the statement:

    a. On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun.

    b. Williams alone left with the black males, telling Villegas that he was going to do "something crazy."

    c. Williams returned later and told Villegas that he had killed Lazo and England. (WH, 9/15/11, 40).

36. After Villegas finished this story, Villegas then testified that Detective Marquez took the paper from the typewriter, crumpled it up, and slapped Villegas. Detective Marquez then threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (WH, 9/15/11, 40-41).

37. Villegas then testified Detective Marquez then waved Williams' statement at Villegas and told him that Williams had named "Snoopy" and Marcos Gonzalez as accomplices. Villegas told Detective Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (WH, 9/15/11, 44).

38. Villegas testified Detective Marquez then left the room, but returned shortly thereafter to tell Villegas that Marcos Gonzalez had also implicated Villegas as the shooter. (WH, 9/15/11, 46).

39. Villegas agreed to sign a one-page statement prepared by Detective Marquez, which included the following details:

    a. Villegas, Marcos Gonzalez, Rodney Williams, Popeye and Droopy were together in Popeye's white, mid-size car on the evening of the shooting.

b. Popeye was driving, Droopy was in the front passenger seat, Villegas was in the back behind Droopy, Williams was seated next to Villegas in the back, and Gonzalez was next to Williams in the back behind Popeye.

c. They stopped for a "beer run" at Diamond Shamrock, where they stole two 24-pack cases of beer. Villegas served as a lookout during the "beer run."

d. After the boys drank one case of beer, Popeye drove them down Transmountain Road, where they saw four other boys, including Armando Lazo, walking along the side of the road.

e. Droopy yelled "Que Vario" out the window at the boys, and the four boys on the street hollered something back.

f. Villegas was then handed a small black gun.

g. Popeye drove back to the scene and stopped the car. Lazo approached and said "What's up? What's up?"

h. Villegas fired one shot in the air to scare the boys on the street, followed by more shots aimed directly at the group of four boys.

i. Someone in the car yelled that Lazo was getting away and we needed to "finish him off."

j. "Someone" then "finished [Lazo] off." Villegas did not name himself as the one who "finished him off." (WH, St. Ex. 1).

40. Detective Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. Villegas was then taken back to Magistrate Horkowitz where after being given *Miranda* warnings again, he signed the confession at 2:40 a.m.. (WH, St. Ex. 1).

41. While Detective Marquez was interrogating Villegas at JIS, he would take breaks and speak with Detective Graves, who was simultaneously re-interrogating Marcos Gonzalez at Police Headquarters. During these conversations, Detective Graves learned that pertinent facts in Daniel Villegas' statement conflicted with Gonzalez's first signed statement.

Detective Graves' testimony during the evidentiary hearing was that he was in contact with Detective Marquez during this time period. (T1, 12/8/94, 494; T2, 8/24/95, 473).

42. Gonzalez ultimately signed a second statement. (WH, St. Ex. 56; T1, 12/8/94, 432-34).

43. Gonzalez's second statement was typed by Detective Graves and conflicted with his first statement in the following ways:

44. The following differences were in Gonzalez' statement:

First Statement	**Second Statement**
a . The driver of the car was "Snoopy"	The driver of the car was "Popeye"
b. The front passenger was "Popeye"	The front passenger was "Droopy"
c. Gonzalez was not present at the shooting	Gonzalez was at the shooting

(WH Pet. Ex. 56; WH St. Ex. 1; WH, 9/15/11, 44).

45. Gonzalez's second statement are consistent with the details in Villegas' signed statement. (WH, Pet. Ex. 56; WH, St. Ex. 1).

46. Gonzalez's second statement includes additional new details regarding what he witnessed during the shooting. Each of these details is consistent with Villegas' signed statement. (WH Pet. Ex. 56; WH St. Ex. 1).

47. Marcos Gonzalez was charged but never prosecuted for any crime related to the Electric Street shooting. (T1, 12/8/94, 473).

48. Daniel Villegas' signed confession contained details that are demonstrably false and factually impossible in the following ways:

a. The boy identified as "Popeye" was incarcerated at the time of the offense; he therefore was not driving the car involved in the shooting.

b. The boy identified as "Droopy" was under house arrest at the time of the shooting; he was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims.

c. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys. (WH, 9/8/11, 153-54, 195; WH, 9/15/11, 59).

49. Rodney Williams' signed statement contained the same demonstrably false and factually impossible details. (WH, Pet. Ex. 29).

50. Both of Marcos Gonzalez's statements contained the same demonstrably false and factually impossible. Additionally, no beer was stolen from the 7-Eleven at Hondo Pass and Railroad on the evening of the murders, as indicated in Gonzalez's second statement.

51. Daniel Villegas' signed confession also conflicts with other evidence in the case in the following ways:

a. The color of the vehicle used in the shooting:
   i. Villegas statement: white (WH, St. Ex. 1).
   ii. Other evidence:
      1. *Surviving victim Jesse Hernandez*: maroon or red (WH, Pet. Ex. 24).

      2. *Surviving victim Juan Medina*: goldish (WH, Pet. Ex. 51).

      3. *David Rangel's statement documenting Villegas' alleged confession*: black (WH, Pet. Ex. 26).

      4. *Gonzalez's first statement:* beige (WH, Pet. Ex. 56).

b. Where the demonstrably false beer run occurred:
   i. Villegas statement: Diamond Shamrock at Dyer near the Village Two Apartments (WH, St. Ex. 1).

   ii. Other evidence: Marcos Gonzalez's first statement says the beer run occurred at 7-Eleven at Hondo Pass and Railroad. (WH, Pet. Ex. 56).

c. First interaction with the four victims:

i. Villegas statement: Upon seeing the victims, Droopy yelled from the car, "Que Vario." (WH, St. Ex. 1).

ii. Other evidence:

1. *Surviving victim Jesse Hernandez*: Someone from the car yelled "Que Putos." (WH, Pet. Ex. 24).

2. *Surviving victim Juan Medina*: Someone from the car yelled "come here." (WH, Pet. Ex. 51).

3. *Rodney Williams' statement*: Popeye, not Droopy, yelled "Que Barrio." (WH, Pet. Ex. 29).

4. *Marcos Gonzalez's second statement*: Villegas, not Droopy or Popeye, yelled "VNE Putos." (WH, Pet. Ex. 56).

d. The shooting of Armando Lazo

i. Villegas statement: After the initial gunshots from the car, the perpetrators chased after Lazo, "finishing him off" while he was running away toward the home of the Gorhams. (WH, St. Ex. 1).

ii. Other evidence:

1. No additional shell casings were recovered beyond the six found together on Electric Street.

2. Neither the Gorhams, Hernandez, nor Medina reported seeing or hearing a new set of gunshots after the initial five or six shots.

3. Lazo had no entrance wounds to the back, suggesting he was not shot again, or "finished off," while running away. (WH, 9/8/11, 130-33, 205-06, 212-15; WH, Pet. Ex. 61; T2, 8/24/95, 167-68).

52. Daniel Villegas recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he

only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear." (WH, Pet. Ex. 42).

53. Neither the vehicle nor the gun used in the crime was ever located as part of the police investigation into the Electric Street shooting. (WH, 9/8/11, 202; WH, St. Ex. 1; WH, Pet. Ex. 26, 29, 56).

54. In the days following the shooting and prior to the statements of Villegas, Gonzalez, Williams, and Rangel, the local media reported on the shooting, including articles that were published in the El Paso Times on April 11, April 13, and April 18, 1993. See Gordon Dickson, *2 Teens Gunned Down Leaving Party*, El Paso Times, April 11, 1993, at 1A; Joe Olvera, *Beaumont Reviews EMS Call*, El Paso Times, April 13, 1993, at 1A; Gordon Dickson, *Help Police Find Suspects Who Shot and Killed Teens*, El Paso Times, April 18, 1993 at 7B (collectively, the "El Paso Times articles").

55. Daniel Villegas had seen these newspaper articles and discussed them with his friends, including David Rangel and Marcos Gonzalez. (T1, 12/7/94, 153-55; T1, 12/8/94, 423).

56. At some point during the investigation, an exculpatory tape recording was made in which a witness divulged the identity of a killer that was not Daniel Villegas, as well as the location of the .22-caliber gun used in the murders. This tape went missing before trial and has never been found. Detective Marquez was aware of, and listened to, the tape. (WH, 9/9/11, 24-27; WH, Pet. Ex. 92; T2, 8/24/95, 9-11, 499-502).

B. Findings of Fact Related to Daniel Villegas' First Trial.

57. Villegas' first trial for capital murder began on December 5, 1994, 592 days after his arrest on April 21, 1993. The State was represented by prosecutors Jamie Esparza and John Williams. Villegas was represented by retained counsel Jaime Olivas. (T1, 12/5/94, 1-2).

58. Each side gave opening statements. Olivas' opening statement highlighted the flaws in the State's evidence, namely that the details in the signed statements contradicted other evidence in the case or were demonstrably false; that the detectives who obtained the statements had a

pattern of using intimidation and illegal interrogation tactics, and had done so against Villegas; and that Villegas was particularly vulnerable to these tactics because he was mentally slow. Olivas also suggested that Rudy Flores had a motive to commit the crime and that his car matched the description given by one of the surviving victims. (T1, 12/5/94, 1-12).

59. The State presented the testimony of the surviving victims – Jesse Hernandez and Juan Medina – and of the Gorhams to explain the circumstances of the shooting. None of them were able to identify the assailants or anyone in the car. (T1, 12/7/94, 3-51).

60. The State presented the testimony of several responding officers, crime technicians, forensic officers, and the medical examiner. Through direct and cross-examination, none of these witnesses were able to connect Daniel Villegas, Rodney Williams, Marcos Gonzalez, Popeye," "Snoopy," or "Droopy." (T1, 12/7/94, 51-119, 130-43, 183-198).

61. The State presented the testimony of David Rangel and asked that he be treated as an adverse witness because it "knew he was going to deny" his previous statement to police. Rangel did not deny his previous statement. Specifically, Rangel testified that Villegas did claim responsibility for committing the shooting on Electric Street with a sawed-off shotgun during a telephone conversation with Rangel; Rangel, however, knew Villegas was kidding. (T1, 12/7/94, 144, 145-82).

    a. On cross-examination, Olivas elicited from Rangel that Villegas often "talked shit" and pretended to have committed crimes in which he actually had no involvement. Olivas also elicited from Rangel that he knew that Villegas had read the El Paso Times articles. (T1, 12/7/94, 178-79, 180).

62. The State called Rodney Williams even though he informed state representatives at least a week prior to trial that his statement to police was coerced and untrue. Williams testified regarding the circumstances of his questioning. Williams further testified that his statement, in which he had implicated himself and Villegas in the Electric Street shootings, was entirely false. Williams also provided an alibi for himself and Villegas, testifying that the two of them, as well as Marcos Gonzalez, were with "Linette" and Williams' brother from 10:15 p.m. to 12:30 a.m.

on the evening of the shooting. They were babysitting two girls and watching the movie "White Men Can't Jump." (T1, 12/8/94, 205-73).

a. On cross-examination, Olivas elicited from Williams that all of the details in his signed statement to police were fed to him by his interrogators. Olivas also elicited the details of the threats. Williams also testified that neither he, Gonzalez, nor Villegas owned a red, maroon, or goldish car. (T1, 12/8/1994, 244-60, 246).

63. The State called Marcos Gonzalez. Gonzalez corroborated the alibi as testified to by Rodney Williams, including the name of the movie they watched. He further testified on direct examination that the statement he signed at the police station was not true, and he only signed the two statements because they were "beaten out" of him. (T1, 12/8/94, 399-478, 436, 440).

a. On cross-examination, Olivas elicited testimony regarding the detailed threats made to Gonzalez during his interrogation. Olivas also elicited that Gonzalez did not even know the meaning of certain words in the statements he signed and that the details in Gonzalez's signed. Olivas further elicited from Gonzalez the details in his confession that were demonstrably false. (T2, 12/8/94, 445-61).

64. The State also called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge. Through Detective Marquez, the State introduced into evidence Villegas' signed statement, which Marquez and the juvenile officer denied was obtained through any threats, promises, or other illegal interrogation tactics. Detective Marquez also denied ever stopping at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. He also denied the allegations made by David Rangel during his testimony. Detective Graves, who took Gonzalez's two statements and Williams' statement, also denied using any illegal or coercive interrogation tactics. (T1, 12/8/94, 274-396, 481-539).

a. On cross-examination, Olivas pointed to many other alternative suspects in this case, including others who confessed to the offense and the Flores brothers. Olivas also highlighted the demonstrably false details in the statements of Villegas, Gonzalez, and Williams.

Indeed, Detective Marquez admitted on cross-examination that Popeye could not have been involved in this crime. Olivas also elicited that allegations of perjury had been made against Detective Marquez, and that Detective Graves had been the subject of an internal affairs investigation. (T1, 12/8/94, 324-25, 448; T1, 12/9/94, 501-02, 676-80).

65. In short, as the State itself remarked in closing argument, the State's entire case against Daniel Villegas revolved around the four alleged out-of-court statements given by David Rangel, Marcos Gonzalez, Rodney Williams, and Daniel Villegas, each of which had been disavowed prior to trial. (T1, 12/12/94, 52, 58-62).

66. During the defense case, Olivas put on eighteen witnesses to support (1) an alibi defense; (2) that the signed statements were made as a result of police intimidation and illegal and coercive interrogation tactics used on the particularly vulnerable Villegas and Williams; and (3) that the signed statements were entirely unreliable because they included demonstrably false details and conflicted with other evidence.

67. Priciliano Villegas, Lesley Williams, Veronica Ramirez, Sally Williams, Linette Moore, and Daniel Villegas himself were all called to testify in support of Villegas' alibi, which was initially established by Gonzalez and Williams on direct examination (T1, 12/8/1994, 243, 452-460; T1, 12/9/1994, 657, 713-20; T1, 12/12/94, 774-77, 789-90, 802, 806-10; WH, Pet. Ex. 59).

68. A series of witnesses established that Detective Marquez has exhibited a pattern of using illegal interrogation tactics, including in this case, and committing perjury, including:

    a. Michael Gibson and Bruce Weathers, both practicing attorneys in El Paso, testified that Detective Marquez has a reputation for untruthfulness. Gibson, a former First Assistant Chief Felony Prosecutor and Director of the Organized Crime Unit in El Paso, actually twice presented a perjury indictment to the grand jury against Marquez. (T1, 12/9/1994, 550-80; T1, 12/12/1994, 786).

    b. Michael Johnston, as well as his mother Barbara Hoover, testified that Detective Marquez used illegal interrogation tactics leading to

Johnston's own false confession to the Electric Street murders. (T1, 12/ 9/1994, 587, 589).

c. Detective Marquez himself was recalled and testified that he had been the subject of a number of Internal Affairs investigations. He also testified that there have been roughly thirty citizen complaints against him. (T1, 12/9/94, 678-80).

d. Daniel Villegas testified to the threats made to him by Detective Marquez during the interrogation, and the other surrounding circumstances of his interrogation. (T1, 12/12/94, 813-23).

69. Patricia Rangel, the mother of David Rangel, testified that David did not go voluntarily to the police station but instead went because police falsely told him that they wanted to question him about a telephone harassment complaint. This testimony was consistent with David's testimony and contradicted Detective Graves' testimony. (T1, 12/9/94, 696-97; WH, Pet. Ex. 38).

70. Several witnesses were called to demonstrate that Daniel Villegas had a particular vulnerability to falsely confessing under coercive police interrogation and had at times pretended that he had done things, including criminal acts, that he did not really do, including:

a. Priciliano Villegas, Daniel Villegas' adopted father, testified that Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. He described Villegas as impressionable, easy to trick, someone who thought more like a child than an adult, and tells people what they want to hear. He also testified that Daniel Villegas was "hyper" and prone to boasting. (T1, 12/9/94, 647-49, 651-52, 655).

b. Patricia Rangel, who is the aunt of Villegas and had known him his whole life, testified that he was prone to boasting and exaggeration. (T1, 12/9/94, 701, 704-06).

c. Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, testified that Villegas likely had a learning disability, attention deficit disorder, emotional problems, and possible mild mental

retardation, all of which could make him impulsive and a poor decision-maker. Dr. Rodriguez-Chevres also testified that there is a "strong possibility" that these traits could make Villegas easily influenced by a police interrogation. (T1, 12/12/94, 742-50; WH, Pet. Ex. 72).

71. Sally Williams, Rodney Williams' mother, testified that her son was easily scared and manipulated by people, and that he would say anything to the police if they demanded it. (T1, 12/12/94, 792-93).

72. Olivas elicited testimony to prove that several details in Villegas' signed statement were demonstrably false or inconsistent with the crime scene, including:

    a. Paula Masters testified that she is the owner of the local Diamond Shamrock, and after reviewing her store's records, she found that no beer had been stolen from her store at the date and time in question. She also testfied that her employees are required to report whenever merchandise has been stolen, and none did so that evening. (T1, 12/12/1994, 771).

    b. Lesley Roy Williams, the brother of Rodney Williams, testified that neither Villegas, Gonzalez, nor Williams had a maroon, red, or goldish car. (T1, 12/9/94, 722-23). This was also established during the cross-examination of David Rangel. (T1, 12/7/94, 179).

73. Olivas gave a lengthy closing argument, spanning thirty-four pages of transcript, arguing that Villegas was not guilty based on (1) the alibi, (2) the evidence supporting that the interrogators used illegal tactics and intimidation to secure the statements, and (3) that the statements were unreliable because of the lack of corroborating evidence and the contradictory and demonstrably false details. (T1, 12/12/94, 15-50).

74. The evidence and arguments concluded on December 12, 1994. The jury hung and the trial court declared a mistrial on December 14, 1994.

C. Findings of Fact Related to Daniel Villegas' Second Trial.

75. Villegas' second trial for capital murder began on August 21, 1995. The State was again represented by prosecutor Jaime Esparza, the same man who prosecuted the first trial. Villegas, who at this time was now declared indigent, requested that his first trial counsel Jaime Olivas be appointed to represent him – to which Olivas agreed – but that motion was denied. Instead, Villegas was represented by John Gates, who was appointed a mere sixty-seven days[2] prior to the start of trial. (WH, Pet. Ex. 1, 32, 71).

76. The State presented an opening statement. During this opening, the State detailed the content of the out-of-court statements of Marcos Gonzalez and Rodney Williams implicating Villegas and remarked that the "evidence will show that in all three statements given by Williams, Gonzalez and the defendant, they admit to being there and they point the finger at the defendant . . . and based on all that evidence, the State of Texas is going to ask you to convict the defendant." (T2, 8/24/95, 145).

77. Gates reserved his opening statement until after the State presented its evidence. (T2, 8/21/95, 141, 145).

78. The State's evidence mirrored what it presented at the first trial.

    a. The surviving victims – Jessie Hernandez and Juan Medina – testified similarly to the first trial, and could not identify their assailants or anyone in the car. (T2, 8/21/95, 172-99; T2, 8/22/95, 206-37).

    b. Responding officers and forensic technicians testified and again none were able to specifically connect Daniel Villegas, Rodney Williams, or Marcos Gonzalez to this crime. (T2, 8/21/95, 147-64; T2, 8/22/95, 237-85, 289-306).

    c. Unlike the first trial, the parties stipulated to the autopsy report, and the medical examiner was not called to testify. The stipulation, however, erroneously stated that Lazo was shot three times, when

[3] Attorney Gates' second affidavit states that he was appointed on June 15, 1995, received the transcripts from the first trial on June 23, 1995, and picked the jury on August 21, 1995. The affidavit goes on to state that he was appointed sixty-six days, and had the transcripts sixty days, before trial commenced. Assuming the dates are correct, however, Gates was actually appointed sixty-seven days, and received the transcripts fifty-nine days, before the beginning of trial.

he was really shot twice. Further, the stipulation failed to include the location of the entrance wounds, both of which were in the front of his body. (T2, 8/23/95, 576-79; WH, Pet. Ex. 32a-30-32).

79. As in the first trial, the State's case hinged on the same four alleged out-of-court statements, all of which were again disavowed at the second trial as they were at the first.

    a. David Rangel testified consistently with what he said at the first trial. Gates did not elicit that Rangel knew that Villegas had read the El Paso Times articles nor did he elicit the specific threats made to Rangel by Detective Marquez. (T2, 8/22/95, 307-46).

    b. Rodney Williams and Marcos Gonzalez also testified consistent with their testimony at the first trial asserting that their signed statements implicating Villegas were not true. The State, however, questioned them about their signed statements in detail. Gates failed to object to the State eliciting testimony regarding the substance of Williams or Gonzalez's signed statements, even though that testimony implicated Villegas as the shooter. (T2, 8/22/95, 347-406; T2, 8/23/95, 408-43).

        i. Gates only briefly cross-examined Williams and Gonzalez. He failed to elicit any testimony regarding most of the detailed threats or promises made to them by their interrogators. Gates also did not elicit testimony to the effect that they did not own a red, maroon, or goldish car. Gates also failed to explore on cross-examination Villegas' alibi, as testified to by Williams and Gonzalez on direct. (T2, 8/22/95, 349-53, 377-79, 381-82; T2, 8/23/95, 423-24, 432-41).

    c. The State again called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge, who introduced Daniel Villegas' written statement. These officers generally testified consistently with what they said at the first trial. Detective Marquez added that he could get a confession at any point if "he really wanted to." (T2, 8/23/95, 450-510, 515-75; T2, 8/23/95, 504).

i. Gates failed to cross-examine Detectives Marquez or Graves on any of the citizen complaints, internal affairs investigations, claims of perjury, or other false confessions and claims of illegal interrogation tactics alleged against them. Attorney Gates only minimally cross-examined the law enforcement witnesses regarding the demonstrably false details in Villegas' statement.

80. Following the State's case-in-chief, Gates waived the opening statement he had previously reserved for this time. (T2, 8/24/95, 582).

81. Gates called only one witness, Everett Turner, who testified that he was a master sharpshooter, and that he went out to the scene of the Electric Street shooting in an attempt to recreate the shooting as described in Villegas' signed statement. In doing so, Turner failed to hit his target in ten attempts, and Turner believed it would be "virtually impossible" for an individual to intentionally hit his target four out of five times, like that described in Villegas' confession, under those conditions. (T2, 8/24/95, 582-602).

a. Gates failed to present any of the alibi witnesses from the first trial.

b. Gates failed to present any of the witnesses from the first trial that testified to Detectives Marquez and Graves' pattern of improper police behavior, perjury, and illegal interrogation tactics..

c. Gates failed to present any testimony regarding Daniel Villegas' limited intelligence and particular vulnerability to false confession.

d. Gates failed to present the testimony of Paula Masters to demonstrate that a "beer run" did not occur at Diamond Shamrock, contradicting Villegas' signed statement.

82. Gates failed to request a limiting instruction ordering the jury to consider Williams' and Gonzalez's out-of-court statements only for impeachment purposes, not as substantive evidence for the truth of the matter asserted. (T2, 8/22/95, 347-376, 404).

83. Gates' closing argument spanned twenty pages of transcript. During the argument, Attorney Gates specifically suggested that the jury could

consider Gonzalez's and Williams' out-of-court signed statements as substantive evidence. Attorney Gates also spent much of his argument suggesting that Villegas did not intend to kill, but he only committed a reckless act by shooting off the weapon toward the victims. (T2, 8/24/95, 609-629; T2, 8/24/95, 611, 618-19, 625, 628).

84. The State's rebuttal closing argument specifically asked the jury to consider the out-of-court statements of Gonzalez and Williams as substantive evidence, arguments to which Attorney Gates never objected:

And who does [Marcos Gonzalez] finger? The defendant. Who did Rodney Williams finger? The defendant. Now, what consistency. (T2, 8/24/95, 641).

Who does [Rodney] finger? The defendant... This is direct evidence from the boys who were there. (T2, 8/24/95, 642).

[T]his case revolves around three things, doesn't it? Marcos Gonzalez, Rodney Williams and the defendant. ... Why, if they were bragging, why would they be so accurate? Why would they tell us that this happened as they came down Transmountain and they turned on Electric? Why would they tell you that they had seen those people before? That they had fronted them? Unless it was the truth. (T2, 8/24/95, 649).

Guess what? Not only do [Williams, Gonzalez, and Villegas]'s confessions – not only are their statements consistent, not only is their alibi consistent, but I got the three of them together on April 10th, 1993. (T2, 8/24/95, 651).

85. The State's closing argument also specifically pointed to the lack of evidence presented by the defense, evidence that was presented at the first trial:

They got the same alibi. We were babysitting. We were over there up above the apartments babysitting. . . Where is the mother who needed babysitting? (T2, 8/24/95, 637).

Our case was here to be tested and all we got was Everett Turner. (T2, 8/24/95, 643).

There isn't any evidence that he lacks the intelligence to make this confession. None. Absolutely none, so don't go back there and say, well, he's just not smart enough. That's why he took the fall. Think about it. (T2, 8/24/95, 647).

Did you hear any evidence that he wasn't smart enough to make this statement? None. None. No one came in here and told you he was academically slow. No one came in here and told you he was mentally retarded. No one told you his IQ. No one told you that the words in that confession were too big or too large and he couldn't understand them. No one told you that. You can't argue it back there because that's not evidence. You would be guessing. (T2, 8/24/95, 648.)

86. The evidence and argument concluded on August 24, 1995, with a jury finding Villegas guilty of capital murder. Villegas was sentenced to life in prison. (T2, 8/24/95, 653).

D. PROCEDURAL HISTORY

87. On September 8th 1995, Villegas filed notice of appeal.

88. On appeal, Villegas challenged: (1) the procedure for his transfer from juvenile court to the district court and (2) the trial court's denial of his motion to suppress his confession.

89. On July 10th 1997, the Eighth Court of Appeals overruled all of Villegas' appellate issues and affirmed the judgment of the trial court.

90. On appeal, Villegas was represented by attorney Carol Cornwall.

91. Villegas' conviction became final on September 17th 1997, when the Eighth Court of Appeals issued its mandate.

92. Over twelve years after mandate issued, on December 23rd 2009, Villegas filed his application for writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure.

93. Villegas was represented on his writ by attorney Charles L. Roberts.

94. Villegas' writ application alleged a single ground for relief (with multiple sub-grounds) that he received ineffective assistance of counsel in his second trial.

95. On January 25th, 2010, the 41st District Court signed an order designating the issue (ODI) to be resolved as whether applicant was denied effective assistance of counsel in his retrial as alleged in Villegas' writ application at the time the ODI was signed.

96. The 41st District Court's ODI directed attorney John Gates to submit an affidavit to the Court regarding his representation of Villegas.

97. On February 19th 2010, attorney John Gates filed his affidavit.

98. On February 25th 2010, the 41st District Court recused itself from further participation in the writ proceedings due to a conflict of interest.

99. On March 1st 2010, Villegas' writ application was transferred to the 409th District Court by Judge Stephen Ables, presiding judge, Sixth Administrative Judicial Region.

100. The State filed its answer to Villegas' writ application on December 15th 2010.

101. An evidentiary hearing was set for April 25th 2011.

102. On April 20th 2011, five days before the scheduled evidentiary hearing, Villegas filed a new application for writ of habeas corpus asserting two grounds for relief: (1) a claim of ineffective assistance of counsel by his second trial counsel, and (2) a claim of "actual innocence" based on new evidence.

103. The new writ application alleged only that attorney John Gates rendered ineffective assistance due to: (1) failure to investigate and discover that Villegas' confession was illegally obtained, (2) failure to interview and call known defense witnesses, (3) failure to consult with first trial attorney Jaime Olivas, (4) failure to object to inadmissible testimony, (5) failure to request a limiting instruction, (6) failure to request expert witnesses, (7) failure to adequately consult with Villegas, and (8) cumulative error.

104. Villegas' new actual innocence claim alleged that newly discovered evidence showed that: (1) Villegas' confession was coerced, (2) another person "may have been involved," and (3) Villegas' confession contained impossibilities of fact.

105. On April 21st 2011, the State filed its written objection to consideration of Villegas' new writ allegations.

106. The State objected to consideration of Villegas' new writ allegations on the grounds that the State was not accorded its statutory 15-day response time set forth in article 11.07 of the Texas Code of Criminal Procedure.

107. Villegas' "actual innocence" claim was not designated by the 41st District Court as issues involving "controverted, previously unresolved facts that were material to the legality of the applicant's confinement."

108. The State filed its answer to Villegas' new writ application on May 5th 2011.

109. On May 25th 2011, this Court promulgated an Order Designating Issues.

110. This Court found that the issues of fact to be resolved concerned whether: (1) applicant was denied effective assistance of counsel, to wit: by failure to investigate and discover that applicant's confession was illegally obtained, failure to investigate by interviewing witnesses and consulting with first trial defense counsel Jaime Olivas, failure to call known defense witnesses, failure to object to inadmissible testimony, failure to request a limiting instruction, failure to request expert witnesses, failure to consult with applicant, and cumulative error; and (2) applicant is actually innocent based on new evidence, to wit: that applicant was coerced by Detective Marquez into confessing to a double murder he did not commit, recently obtained police reports suggest another individual may have been responsible for the murders, and recently obtained photographs and affidavits demonstrate that the version of applicant's confession contained impossibilities of fact.

111. Evidentiary hearings were held on June 21-24 2011, before being continued until September 6 2011.

112. On September 7 2011, the State again filed written objections to this Court's litigating new and additional grounds for relief not properly pled in Villegas' writ application.

113. Additional evidentiary hearings were conducted on September 6-9 2011, and September 14-15, 2011.

114. The parties were given until October 18 2011, to submit any final affidavits to be considered by the Court, with any counter affidavits to be submitted by October 31 2011.

115. On October 18 2011, Villegas submitted various materials, to include a polygraph results and an affidavit from a juror from Villegas' second trial.

116. On October 18 2011, the State submitted, in their entirety, nine recordings of alleged phone calls made by Villegas while incarcerated in the El Paso County jail.

117. On October 31 2011, the State submitted one additional recording of jail-recorded phone calls by Villegas, an affidavit from inmate Onnie Kirk relating an alleged admission by Villegas that he committed the murders of England and Lazo, and transcripts of portions of the jail-recorded telephone calls.

118. On October 31 2011, the evidentiary portion of the writ hearing closed.

119. On November 10 2011, the State filed its Supplemental Answer to Applicant's Application for Writ of Habeas Corpus.

120. In its supplemental answer, the State reiterated its previous objections to this Court's consideration of any claims not properly pled in Villegas' writ application.

121. Closing arguments were held on November 10 2011, and this Court took the writ under advisement.

E. Findings of Fact Related to the Evidentiary Hearing on Daniel Villegas' Writ of Habeas Corpus.

122. Villegas was represented by Joe Spencer, Joshua Spencer, and Luis Gutierrez at this hearing. The State was represented by Jim Callan, and Doug Fletcher and John Briggs

123. John Gates, who was appointed to represent Villegas sixty-seven days prior to the start of the trial, used the five volumes of transcripts from Villegas' first trial as the primary source of his preparation. He did not receive these transcripts until eight days after being appointed, or fifty-nine days before trial. John Williams, one of the attorneys who prosecuted Villegas at his first trial, testified that he could not have been prepared to prosecute the case in such a short time, and he did not believe any defense counsel could be effective in this case with such a short preparation time. (WH, Pet. Ex. 1 ,32a; WH, 9/6/11, 66-67).

124. Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. (WH, 9/6/11, 12-14; WH, Pet. Ex. 32a-4).

125. Neither Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, all of whom would have cast doubt on the credibility of Detectives Marquez and/or Graves, and would have supported the argument that Villegas' confession was coerced and false:

a. Detective Earl Arbogast, who would have testified that, contrary to Detective Marquez's testimony at both trials and the evidentiary hearing, the police did stop at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. Detective Arbogast would have also testified that Detective Marquez did not have Villegas sign a *Miranda* warning card at home, contrary to the Detective Marquez's testimony. (WH, 6/21/11, 25, 27; WH, 9/8/11, 161-65).

b. Detective Ortega, who did testify for the State at the second trial. Had Gates been prepared, he would have been able to cross-examine Ortega on the discrepancy in his report regarding the time of the *Miranda* waiver, demonstrating that it was signed at 11:15 p.m, while Daniel was already in custody at Juvenile Investigative Services. This conflicted with the testimony of Detective Marquez and demonstrated that Marquez was not credible when he stated that he arrested Villegas shortly after 11:00 p.m., where he allegedly had him sign a warning card at home. (WH, 6/21/11, 159, 196, 206-07; WH, 9/8/11, 161-65).

c. Jesse Hernandez, one of the surviving victims who also testified at trial for the State. Had Attorney Gates prepared or interviewed Hernandez, he would have learned that Detective Marquez used intimidation, threats, and lies when questioning him two days after the murder, accusing Hernandez himself of killing his friend in the manner. (WH, 6/22/11, 54-55).

d. Michael Johnston and his mother Barbara Hoover, who would have testified regarding Detective Marquez's coercive interrogation of Johnston, which actually led to his false confession in this case. (T1, 12/8/94, 312, 317; T1, 12/9/94, 587-89, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

e. Patricia Cates (formerly Rangel), the mother of David Rangel, who would have testified consistent with her testimony at the first trial. (T1, 12/9/94, 696-97; WH, 6/22/11, 87-88, 93, 99).

f. Detective Arturo Ruiz and Lieutenant Paul Saucedo, both of whom would have testified that contrary to Detective Marquez's testimony, Detective Marquez never asked or ordered either of them to find or listen to a tape containing exculpatory evidence, and thus that they never listened to such a tape. (WH, 6/22/11, 6, 10-11; WH, 9/14/11, 44-45).

g. A police interrogation expert, such as Dr. Richard Leo, who testified at the evidentiary hearing. Such an expert could have educated the jury about the police interrogation process, how the process – especially as alleged in this case – can lead to false

confessions, and how a jury should analyze Villegas' confession to determine its reliability. (WH, 9/9/11, 129-31).

125. Gates, nor any agent or investigator working on behalf of him, ever contacted, interviewed, subpoenaed or called to testify the following witnesses on behalf of Villegas who could have supported the argument that Villegas was particularly vulnerable to police pressure and false confession:

h. Jesus Lechuga, who was the bond officer for Villegas prior to trial and the individual to whom Villegas reported for 12-18 months. Lechuga would have testified that Villegas was a very poor reader with very poor comprehension; indeed, Villegas did not understand that a "home" was the same thing as a "house." (WH, 6/22/11, 167, 169-71).

i. Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody. Renteria would have testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (WH, 6/22/11, 122).

126. Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, and could have supported the guilt of Rudy Flores and Javier Flores:

j. Terrance Farrar, who would have testified to witnessing a confrontation between Rudy Flores and Armando Lazo two weeks prior to the shooting, during which Flores threatened to kill Lazo. This testimony would have provided a motive for Rudy Flores. Farrar would have further testified to Rudy "stabbing at" Farrar and Javier Flores shooting at him on previous occasions. (WH, 6/23/11, 93-98, 100-01; WH, Pet. Ex. 30).

k. Rocio Gutierrez, who was Armando Lazo's girlfriend prior to his death, who would have testified that Javier Flores and Armando

"had problems" and that both Flores brothers had a reputation for violence. (WH, 6/23/11, 134, 136-37, 141-42).

127. Gates signed an affidavit admitting that he "overlooked" or "did not utilize" substantial amounts of "vital, material, and relevant" evidence. He also admitted that he erred in entering the stipulation to the autopsy report, as it would have been important to highlight that Lazo was not shot in the back, contradicting the suggestion in Villegas' signed statement that he was shot while running away. (WH Pet. Ex. 4, 32a).

128. Gates further admitted that he "missed several key issues" and that Villegas' capital case required "much more preparation" than he did or had time to do. He admitted that had he not made these errors and omissions, "there would have been no plausible reason not to utilize this evidence for Mr. Villegas' second trial." His "trial strategy would have been different and more effective," and he believed "the outcome may have been different." (WH, Pet. Ex. 32a).

129. The evidentiary hearing also produced evidence pointing to the innocence of Daniel Villegas and the guilt of Rudy and Javier Flores through the testimony of the following witnesses:

a. Jamarcqueis Graves was at the Mount Franklin Apartments with several other people shortly after the Electric Street shootings. While there, Graves overheard a conversation between Javier and Rudy Flores with Ben Watson, Phil Tucker, and Johnny Tucker. During this conversation, the Flores brothers referred to "Danny Boy" being "locked up because he went down for something that they had did." Graves also witnessed one of the Flores brothers give Phil a .22-caliber gun and tell him to dispose of it. Graves did not come forward with this information sooner because he was unavailable: he was either incarcerated or living out-of-town in the years between the shootings and the writ hearing. He also generally went on with his life, not knowing that Villegas received a life sentence for the crime. Graves came forward recently, at the urging of his current girlfriend, when he saw the case on the news and billboards around town and told his girlfriend that he knew who

the true killers were. (WH, 9/6/11, 21-22, 26, 40-41, 47-48, 52-53).

b. Connie Martinez Serrano, who knew the Flores family, accompanied a woman named Gloria to the Flores house right after the shooting on Electric Street, as Gloria was intending to pick up a gun. While at the house, Sally Flores, the sister of Rudy and Javier, went to her closet and retrieved a .22-caliber gun, but Gloria would not take the gun after she found out it had been used before. Serrano also revealed that Rudy Flores' best friend, who goes by the nickname Half-Pint, told her that Rudy admitted to shooting the boys on Electric Street. Serrano called Crime Stoppers several times during the investigation to tell them that Rudy Flores was responsible for the crime, but she was rebuffed and told they had the correct killer in custody. (WH, 9/6/11, 89, 91-94, 97; WH, Pet. Ex. 34).

130. The affidavit of Tony Kosturakis, a private investigator retained by Villegas, was also admitted into evidence. This statement confirmed the prior existence of an exculpatory tape. The statement also established that Investigator Kosturakis, at one point, spoke to a witness who confirmed the existence of a hidden .22-caliber gun at the Flores home. (WH, Pet. Ex. 92).

131. Rudy Flores was twice called to testify at the evidentiary hearing, both times invoking his Fifth Amendment right not to incriminate himself. The second time, this Court ordered him to answer the questions, finding that he had waived his privilege by previously signing an affidavit relating to this matter. Flores refused and was found in direct contempt of court. (WH, 9/14/11, 55-57; 9/15/11, 5-8, 12; WH, St. Ex. 6).

132. This Court also finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case, such as:

a. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him, and

b. Testimony from other law enforcement officers inconsistent with Detective Marquez's testimony

i. Denying that he stopped at Northpark Mall or going to Police Headquarters,

ii. That he ordered other detectives to retrieve what may have been a tape exculpatory to Villegas, and

iii. That he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez.

c. Testimony from Detective Marquez during the evidentiary hearing that on a previous occasion, he wore a "smock" commonly worn by medical personnel, during the interrogation of a criminal suspect. He further testified that the smock was not used for deception purposes. This Court finds no conceivable way that the wearing of a smock commonly worn by medical personnel, was not intended to deceive this suspect into believing that he was talking to medical personnel and not law enforcement.

In short, this Court gives the testimony of Detective Marquez at the evidentiary hearing little to no weight.

133. This Court finds that the audio tapes submitted by the State of Texas and the Applicant in this case have no relevance to these findings of fact and conclusions of law.

II. CONCLUSIONS OF LAW

A. THE ACTUAL INNOCENCE CLAIM OF DANIEL VILLEGAS

The Court in this case has reviewed the findings of fact and makes the following conclusions of law concerning the Applicant claim of actual innocence. The Court has reviewed the two (2) trial transcripts held in the 41st District Court, the multitude of evidence presented by the Applicant and the State of Texas in the form of documentation, live testimony, as well as submissions to this Court. The basis of this case is pursuant to the Wirt of Habeas Corpus filed by the Applicant on December 23rd, 2009, as well as the Amended Writ filed on April 20th, 2011. This Court has also received the answer(s) and submissions in contest of these writs from the State of Texas that have been duly considered.

This Court is addressing the claim of actual innocence in accordance with the State and Federal law as it exists at the time of the filing of the Writ of Habeas Corpus. Applicant Villegas has asserted that he is entitled to the writ of habeas corpus because he is actually innocent of the crimes for which he was convicted. Such a claim is cognizable in habeas proceedings, including non-capital cases. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). An applicant may raise a claim of actual innocence under either *Herrera v. Collins*, 506 U.S. 390 (1993), or *Schlup v. Delo*, 513

U.S. 298 (1995). *Ex parte Spencer*, 337 S.W.3d 869, 877 (Tex. Crim. App. 2011). This Court is addressing this claim as a claim of actual innocence under the holding of *Schlup v. Delo*, 513 U.S. 298 (1995). In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878.

A *Schlup* claim, in contrast to *Herrera*, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, a *Schlup* Applicant's conviction may not be entitled to the same degree of respect as one, such as *Herrera's*, that is the product of an error-free trial. Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as in *Schlup* presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner may pass through the gateway and argue the merits of his underlying claims. Consequently, the Applicant's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well-founded),

the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" even if his conviction was the product of a fair trial. For *Schlup*, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial. See *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex.Crim.App. 1996).

In *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the petitioner raised a claim of actual innocence in an effort to bring himself within the "narrow class of cases" implicating fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ. The Court took pains to distinguish between *Schlup's* claim and the claim presented by the petitioner in *Herrera*. *Schlup's* claim of innocence did not alone provide a basis for relief, but was tied to a showing of constitutional error at trial. *Herrera's* claim of actual innocence had nothing to do with the proceedings leading to his conviction; he simply claimed that execution of an innocent man would violate the Eighth Amendment. The Court expounded upon the differences between the two situations, emphasizing the greater burden that must be borne in order to prevail in a naked claim of actual innocence using clear and convincing evidence.

Clear and convincing evidence is an "intermediate" standard of proof which "falls between the ordinary civil 'preponderance of the evidence' standard and our usual 'beyond a reasonable doubt' standard in criminal cases." *Elizondo*, 947 S.W.2d at 212. It is defined "'as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *Id.* (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

This Court finds that the Applicant in this case has satisfies the standard for actual innocence under the *Schlup* and *Ex Parte Elizondo* analyses under the law. This Court finds that the underlying verdict from the 41st District Court cannot withstand the legal review afforded by the law, being that this Court believes that a reasonable juror, based on the new evidence presented, would not find the Applicant guilty of the crime of capital murder. Applicant's counsel contacted Benjamin D. Hodge III, the presiding juror from Applicant's second trial to listen to the evidentiary hearing. After attending the hearing and listening to the evidence, Mr. Hodge provided the Applicant with an affidavit on September 20th, 2011 stating he would not have voted to convict again. See *(W.H. Pet. Ex 95.)*

The core of this case revolved around the confessions presented by the State of Texas at trial. Moreover, the focus on the confessions must involve the actions and the methods employed by the El Paso Police Department, particularly Detective Al Marquez.

Through the testimony presented, significant and credible evidence was presented that Detective Marquez, as well as other members of the El Paso Police, used at best "questionable" methods in obtaining the confessions used at trial. The Applicant, Rodney Williams, and Marco Gonzalez were subjected to, by this Court's analysis and observations, illegal and coercive methods that bring doubt and concern to the legality of the admissibility of the confessions. Although the State of Texas asserts that these confessions have been litigated and subjected to several legal reviews by the Trial and Appellate Courts, this Court must still question the confessions based upon the testimony of Detective Marquez himself at the evidentiary hearing. Based on the evidentiary hearing testimony, the inconsistencies in the statements, as well as voluntariness of the statements, this Court has no other alternative than find that the confessions in this case to be completely unreliable and require this Court to recommend a new trial.

This Court finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion

based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him. Additionally, testimony from other law enforcement officers inconsistent with Detective Marquez's testimony such as denying that he stopped at Northpark Mall or going to Police Headquarters. Testimony that Detective Marquez ordered other detectives to retrieve what may have been a tape exculpatory to Villegas calls his credibility into question. Also, Detective Marquez's testimony that he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez contradicted the testimony of the other officers involved. However, the most disturbing testimony received by the Court was concerning another case where Detective Marquez donned a "smock" while questioning a defendant, with an admission by Detective Marquez, that "the tactic was not done with the intent to deceive." This Court cannot help but come to the conclusion, especially considering the age of the Defendant and other accused juveniles in this case, that these statements

were both factually incorrect as well as illegally obtained by Detective Marquez. This coincides with the testimony that Daniel Villegas immediately recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear."

Detective Scott Graves interrogation of both Rodney Williams and Marco Gonzalez also reveal the same inconsistent information as the Applicant's statement. Gonzalez in fact made two (2) statements which were testified to in the writ hearing. The first statement containing inconsistencies was then amended by a second statement which coincided with the Applicant's statement. Combined with the inconsistent testimony that the officers did not speak to each other, is of importance to this Court.

This Court further finds that the same statements used by the State in obtaining the convictions contain factual impossibilities which calls the conviction into doubt. The Court heard evidence that the Applicant's signed confession contained details that are demonstrably false and factually impossible in several ways. The person identified as "Popeye" was incarcerated at the time of the offense. As such, he was not driving the car

involved in the shooting. The person identified as "Droopy" was under house arrest at the time of the shooting and was under electronic surveillance via an ankle bracelet. He was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys, which was contained in Applicant's statement.

The physical evidence in this case, especially at the scene of the shooting on Electric Street, presented a critical problem for the State of Texas. The problem exists where the State's contention at trial was that Applicant's confession described the manner and positions of the shooters on Electric Street. Specifically, the statement describes that the suspects shot at Armando Lazo by chasing him to a door directly behind them where Lazo began ringing a doorbell for assistance. However, the physical evidence at the scene, both in the trial transcripts as well as the evidentiary hearing, reveal no shots to Lazo's back. In addition, there was no evidence presented that any bullet casings where Lazo allegedly was shot were discovered. This is of great importance to this case as physical evidence is usually the cornerstone of the State's prosecution. In this case, however, the defense not only overlooked this evidence which this Court views as critical, it

disregarded the strongest area of physical evidence to the Applicant's innocence.

The testimony and circumstances of the night of the shooting also causes concern for the Court in viewing the underlying conviction. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. Later on in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. These shootings took place within ¼ mile of each other and the testimony revealed that no investigation by the El Paso Police Department to see if these matters were possibly connected.

Other information not utilized would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street, at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m., just minutes after the shooting, but his brother Javier indicated to the police that Rudy was not home at that time. Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast further suspicion over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege at the writ hearing even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position.

The new evidence provided by Villegas consists primarily of the testimony of Jamarcqueis Graves and Connie Martinez Serrano. The evidence presented by Graves meets the requirement that evidence supporting an innocence claim must be "newly discovered." Graves was entirely unknown to Villegas and his attorney at the time of trial. This lack

of knowledge was not due to lack of diligence; in fact, Graves was only discovered after he voluntarily came forward at the urging of his girlfriend after seeing news reports and billboards covering Villegas' pending writ hearing. He did not come forward earlier because he had been incarcerated and later moved out-of-state for a time.

Ms. Serrano was similarly unavailable. Although she did contact the police shortly after the Electric Street shootings, she was unmentioned in any police reports as having information related to the Flores family, and therefore Villegas could not be expected to discover this evidence. This evidence is material such that it would probably bring about a different result at another trial and, moreover, it constitutes affirmative proof of Villegas' innocence. According to Graves, the Flores brothers did not merely take responsibility for the shootings; rather, they specifically articulated that Villegas was innocent and "locked up because he went down for something that they had did." The importance of Graves' testimony could not be clearer. The Flores brothers could have been responsible for the shooting.

Graves' testimony also states that he witnessed one of the Flores brothers give someone a .22-caliber gun to dispose. This testimony is corroborated by that of Connie Martinez Serrano, who states that she was

with a woman named Gloria at the Flores house very shortly after the Electric Street shooting. During this visit, Sally Flores, the sister of Javier and Rudy, tried to give Gloria a .22-caliber gun, but Gloria refused when she learned it had been used. This testimony demonstrates that the Flores family was attempting to dispose of a .22-caliber gun, lending credibility to Graves' testimony that the Flores brothers later ordered their friend Phil to dispose of the gun. This testimony is further corroborated by Tony Kosturakis, a private investigator retained by Villegas, who said that he spoke to a witness who gave similar information about a hidden .22-caliber gun at the Flores home.

Finally, Javier Flores' own statement to police during the investigation contradicts his brother Rudy's statement claiming that he was home on April 10, 1993 at 12:30 a.m., near the time of the shooting. Javier maintains that he arrived home at 12:30 a.m., and Rudy was not there. (WH, Pet. Ex. 34, Pet. Ex. 35.) This contradiction suggests that Rudy may have been attempting to create a false alibi for himself.

At Villegas' second trial, no evidence was presented that Rudy Flores could have committed the crime for which the Applicant was convicted. Therefore, Jamarcquies Graves' testimony is independently competent and is not cumulative, corroborative, collateral, or impeaching. *Van Byrd v. State*, 605 S.W.2d 265, 267 (Tex. Crim. App. 1980).

In *Schlup*, "the petitioner raised a claim of actual innocence in an effort to bring himself within 'the narrow class of cases' implicating a fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ." *Elizondo*, 947 S.W.2d at 208 (citing *Schlup*, 513 U.S. at 298). Successful *Schlup* claimants are the "extraordinary" cases. *Brooks*, 219 S.W.3d at 400. The Court of Criminal Appeals recognizes that Texas law "allows review of the merits in the exceptional circumstances of a constitutional violation resulting in the conviction of one who is actually innocent of the offense." *Id.* at 401. To grant *Schlup* relief, an applicant must meet the threshold requirement of showing that a constitutional violation led to a miscarriage of justice due to the incarceration of someone who is actually innocent. *Id.*; *see also Ex parte Thompson*, 179 S.W.3d 549, 557 n.19 (Tex. Crim. App. 2005).

As opposed to *Herrera*, a *Schlup* claimant, on the other hand, need only show that he is "probably" actually innocent, meaning "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Elizondo,* 947 S.W.2d at 209; *see also Schlup*, 513 U.S. at 326–27. The lower standard is justified because the conviction "may not be entitled to the same degree of respect of one, such as *Herrera's,* that is the product of an error-free trial." *Schlup*, 513 U.S. at 316. To obtain relief on a

Schlup claim, the claimant must therefore show that the constitutional error at trial probably resulted in the conviction of one who was actually innocent. *Spencer*, 337 S.W.3d at 878.

In this case, this Court finds that the evidence that has been presented by the Applicant, in a cumulative manner, meets the clear and convincing evidentiary standard to determine that the jury in this case could have reasonably found the Applicant innocent in this case. The Court is of the opinion that the new evidence standard has been met under *Schlup*, and now proceeds to examine if constitutional error, if any, can be demonstrated to meet the *Schlup* standard set forth, *infra*.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court has examined the claim of ineffective assistance of counsel in this matter with great attention and detail. This Court has reviewed the law applicable in this case with the evidence and submissions in this case. With the above in mind, it is with clear and convincing evidence that this Court finds that Applicant did not receive effective assistance from John Gates in his trial in the 41st District Court. This Court finds the performance by counsel in this case to fall to such a level that, in and of itself, counsel's performance was deficient to such a level that a fair trial was denied to the Applicant in multiple areas. As such, the performance of

counsel in this case arises to the level of constitutional violation which satisfies the analysis and legal standard not only in the *Schulp* holding, but to the holding in *Strickland v. Washington* as well.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. Const. amend. VI; Tex. Const. Art. I, § 10. The right to counsel necessarily includes the right to reasonably effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id.* at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id.* at 693. Essentially, appellant must show his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; Valencia v. State, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and the Court must indulge the strong presumption counsel was effective. Jackson v. State, 877 S.W.2d 768, *771 (Tex. Crim. App. 1994). The Court*

must presume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. Id. Moreover, it is appellant's burden to rebut this presumption by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 119 (1997). A breakdown in the adversarial process implicating the Sixth Amendment is not limited to counsel's performance as a whole; specific errors and omissions may be the focus of a claim of ineffective assistance as well. *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). The failure to object to evidence has been held to be ineffective assistance of counsel. See *Ramirez v. State*, 65 S.W.3d 156 (Tex. App. — Amarillo 2001, pet. ref'd), *Prudhomme v. State*, 28 S.W.3d 114 (Tex. App. — Texarkana 2000), and *Matter of K.J.O.*, 27 S.W.3d 340 (Tex. App. — Dallas 2000, pet. ref'd).

In *Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009), the defendant was denied effective assistance of counsel when trial counsel failed to request pretrial notice of the State's experts and to object to the

"expert" testimony of a DEA agent at the penalty phase about the dangers and societal costs of methamphetamine use. The officer was not qualified to express the opinions contained in his testimony. Harm was shown where the prosecutor used the testimony to argue for a life sentence, and the jury imposed one. Remanded for new punishment hearing.

In Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991) the defendant was entitled to a new trial where he received ineffective assistance of counsel. Trial counsel failed to object to the indictment, which alleged in one of its counts that aggravated assault was a predicate offense of felony murder, and also failed to object to the charge, which authorized a conviction on this theory. Because the jury returned a general verdict, it was impossible to tell if it relied on this theory to convict and therefore harm was shown. Trial counsel also failed to object when the prosecutor asked the jury to consider the victim's state of mind, rather than the defendant's, when evaluating self-defense. This misstatement of the law was contrary to the jury charge. Absent these errors, there is a reasonable probability that the jury would not have convicted the defendant.

In Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel where trial counsel failed to object to the omission of an accomplice instruction from the jury

charge. Two prosecution witnesses who were charged with involuntary manslaughter in the same incident as the subject of the trial were accomplice witnesses as a matter of law. They gave the only direct evidence that the defendant committed the murder. Therefore, there was a reasonable probability of acquittal if the instruction had been given.

In Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel when his lawyer failed to object to the use of a 1961 capital murder conviction to enhance punishment. The conviction was void because a jury trial was waived, but the lawyer was unaware of this. Under the "reasonably effective assistance" standard applicable to punishment hearings, this was ineffective assistance. Harm was shown because this was the defendant's only prior conviction, use of the evidence kept the defendant from testifying at trial, and the enhancement count raised the minimum from five to fifteen years, which may have influenced the defendant's seventy-five year sentence.

In *Callaway v. State,* 594 S.W.2d 440 (Tex. Crim. App. 1980) almost total failure to object to highly prejudicial argument and testimony at competency hearing and failure to timely subpoena psychiatric witness denied effective assistance. *See also Cude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979) (Denied effective assistance).

In Johnson v. State, 172 S.W.3d 6 (Tex. App.-Austin 2005, the defendant was denied effective assistance of counsel, and a new trial was required, where counsel failed to object to the state's failure to disclose audiotaped statements made by the defendant at the time of the arrest, and, when a portion of the tape was played at trial, failed to offer the exculpatory final portion of the tape. Because the tape was critical to the case, harm was shown and reversal is required.

Under the *Strickland* standard, trial counsel is deficient if his or her conduct is objectively "unreasonable under prevailing professional norms." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89). The adequacy of an attorney's services is to be judged by examining the "totality of the representation." *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981). To establish deficient performance, an applicant must overcome the "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992) (citing *Strickland*, 466 U.S. at 689). This Court must "keep in mind that it must be highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). Despite this presumption,

however, such deference is appropriate only when an attorney has demonstrated reasoned, strategic decision-making. *See, e.g., Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) ("Review of the first prong contemplates deference to *strategic* decision making") (emphasis added); *see also Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding ineffective assistance where counsel's errors were the result of "inattention, not reasoned strategic judgment").

In the case before the Court, multiple and significant errors exist in the trial are of such a deficiency that the Court cannot view the actions of counsel as any form of strategy that any competent lawyer would pursue in a capital murder case. In addition, even with the Court viewing Mr. Gates actions as deferential towards competency, the deficiency of the actions taken in Applicant's trial overcome the standards set in *Strickland* to a level that meets the requirements of the *Schlup* Court and mandate this Court to recommend a new trial. The Court finds that Counsel failed to object to the introduction of the confessions which resulted in ineffective assistance of counsel. Given that Marcos Gonzalez and Rodney Williams denounced their out-of-court handwritten statements and provided exculpatory testimony for Daniel Villegas at his first trial, both the State and Gates were on notice that their in-court testimony would be favorable to Villegas at the second trial.

With this backdrop, this Court must first evaluate whether Gates had a proper legal basis for objecting to the State's introduction of Gonzalez and Williams' hearsay statements under the law at the time of trial in August 1995. *Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) (citing *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) ("counsel's performance will be measured against the state of the law in effect during the time of trial").

Nothing in the record indicates that Attorney Gates had legitimate strategic reasons for failing to object to the State's calling of Gonzalez and Williams, or, at the minimum, request a limiting instruction and object to the State's substantive use of their testimony during closing. In his initial affidavit, Gates merely states that "I only recall making a tactical decision not to attempt to exclude the testimony, but the specific reasoning and mental impressions I cannot remember." (Gates First Aff. at 2). This unsupported assertion is not dispositive. *See Brown*, 304 F.3d at 688 (warning against the acceptance of "post hoc, self-serving" claims from attorneys who make "blanket and general statements" in the context of ineffectiveness proceedings).

This Court further finds that Counsel was ineffective in failing to suppress or challenge the State of Texas in suppressing Applicant's

confession. To obtain relief on the grounds of ineffective assistance of counsel for failing to make a motion to suppress evidence, the defendant "is required to prove that the motion would have been granted." *LaFleur v. State*, 79 S.W.3d 129, 137 (Tex. App. 2002) (citing *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998)). At the time of sixteen-year-old Daniel Villegas' arrest and subsequent confession in this matter, Tex. Fam. Code §52.02(a) provided:

> (a) A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under 52.025 of this code, shall do one of the following:
>
> (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
>
> (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;
>
> (3) bring the child to a detention facility designated by the juvenile court;
>
> (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or
>
> (5) dispose of the case under Section 52.03 of this code.

Act of May 26, 1991, 72d Leg., R.S., ch. 495, § 1, Tex. Gen. Laws 1738. *See also Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999) (explaining the 1991 amendment was in effect at the time of this case).

The purpose of section 52.02(a) is to reduce an officer's impact on a child in custody. *Le*, 993 S.W.2d at 655. Texas reviewing courts have consistently held that any statement from a minor obtained in violation of these provisions of the Family Code will result in the suppression of the statement. For example, in *Le*, the law enforcement officer first took the minor murder-suspect to a juvenile processing center in compliance with section 52.025, but then took him to an unauthorized police station to obtain a statement prior to taking one of the five actions contemplated by section 52.02(a). *Id.* The officer's error therein was not obtaining a statement at an unauthorized locale, but rather doing so prior to first complying with 52.02(a) "without unnecessary delay." *Id.* The error resulted in an illegally obtained confession that should not have been admitted against the minor. *Id.* at 654-56. *See also Comer v. State*, 776 S.W.2d 191, 196 (Tex. Crim. App. 1989) (detaining the minor suspect for the three hours it took to obtain his confession violated 52.02(a). To compound matters further, the conduct of the El Paso Police Department, particularly Detective Al Marquez, who conducted themselves in a manner where even a questionably competent

attorney would challenge their action both before the trial court as well as the jury results in ineffective assistance. The failure of counsel to question any of the witnesses in a suppression, or in trial, allows the inconsistencies of the statements, mentioned *infra*, to stay buried and caused a result that a reasonable juror, now knowing these facts, would change their verdict in the Court's opinion.

Daniel Villegas was arrested at his home at approximately 10:00 p.m. on April 21, 1993. Detective Marquez testified at the first trial that he had his juvenile *Miranda* warnings with him at the time of arrest, read them to Villegas at his home, and knew of his obligation to take Villegas directly to Juvenile Investigative Services, an accepted "juvenile processing office" pursuant to section 52.02(a). Based on the testimony of Detective Arbogast and others at the writ hearing, however, it is now clear Detective Marquez did not take Villegas immediately to Juvenile Investigative Services. Rather, law enforcement officers drove Villegas past the home of Fernando Lujan ("Droopy"), and questioned him as to whether he knew someone named "Snoopy." They then drove to Northpark Mall, where the officers convened for some time. Following that meeting, the officers took Villegas to police headquarters, which was also not a "juvenile processing office," an office designated by the juvenile court, or a juvenile detention facility. *See* Tex.

Fam. Code § 52.02(a)(2), (3); §52.025. Only after Villegas was at Police Headquarters did law enforcement finally take him to Juvenile Investigative Services, or a proper "juvenile processing office." To this end, law enforcement violated Daniel Villegas' rights under the Family Code by failing to comply with section 52.05 "without unncecessary delay." *See Le*, 993 S.W.2d at 655. In short, Detective Marquez should have taken Villegas to Juvenile Investigative Services as he originally testified at the first trial he did, testimony that new evidence demonstrates conclusively is false.

Attorney Gates' first affidavit proposes no strategic reason for failing to seek the suppression of Villegas' confession; given that Villegas's confession was the lynchpin of the State's case, there could be no such sound strategy for failing to do so. *See Mitchell*, 762 S.W.2d at 920. *See also* E. Cleary, McCormick on Evidence 316 (2d ed. 1972) (explaining that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained"). And, indeed, Gates' second affidavit makes clear that his decision was not strategic but rather was based on information that "eluded" him. Attorney Gates admitted that he would have "heavily litigated" the issue of the violation of the Family Code had he (1) interviewed Detective Abrogast and discovered that the officers did not

immediately go to Juvenile Investigative Services, (2) discovered that Villegas' *Miranda* warning card was not signed until 11:15 p.m., (3) utilized the Juvenile Probation Department time logs showing that Villegas did not arrive until 12:26 a.m., or (4) "pick up on the fact" that Detective Ortega's police report states that Villegas had already given a verbal statement prior to meeting with the magistrate or that officers had already requested permission by 12:26 p.m. to take Villegas to Popeye and Droopy's homes. (WH Pet. Ex. 32a). It is clear to this Court that Gates did not make a strategic decision; his conduct, rather, is best explained by the fact that he lacked a firm grasp of the facts of the case.

Despite available evidence from the first trial demonstrating that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics to obtain other false confessions during this investigation and others, Gates almost entirely failed to introduce this evidence to the jury. Gates failed to (1) call Michael Johnston or his mother to testify that Johnston falsely confessed to the Electric Street murders during a coercive interrogation by Detective Marquez, (2) interview Jesse Hernandez to learn that Detective Marquez employed coercive tactics against him, (3) call attorneys Michael Gibson or Bruce Weathers to testify concerning their familiarity with Detective Marquez, his prior acts of

dishonesty, and his prior use of illegal interrogation tactics, and (4) cross-examine or introduce evidence of the many citizen complaints and internal affair investigations related to Detective Marquez. Once again, given the short time between the first and second trials, the evidence and witnesses supporting Detective Marquez's prior conduct were available at the second trial.

Gates, moreover, failed to elicit any significant details from David Rangel, Marcos Gonzalez, or Rodney Williams regarding the coercive circumstances of their interrogations. This failure is particularly noteworthy given that the State has taken the position that Gates strategically chose not to seek to exclude the testimony of Gonzalez and Williams. Gates' failure to highlight the coercive atmosphere under which Gonzalez and Williams' statements were taken undermines the State's argument because this powerful evidence is the most compelling reason for allowing them to testify about their out-of-court statements without objection.

Gates also failed to introduce testimony and arguments through Detective Arbogast and Officer Aguilera demonstrating that Marquez's testimony about immediately taking Villegas to Juvenile Investigative Services, never stopping at Northpark Mall, and reading Villegas his *Miranda* rights at his home at 11:15 p.m. was inconsistent with these

officers' testimony. He further failed to present readily available evidence and argument of Villegas' particular vulnerability to interrogation pressure, including his limited intellectual capacity, his youth, and his tendency to tell people what they want to hear. Compounding these errors was his failure to present evidence of Villegas' immediate recantation to Monica Sotelo and the explanation for his false confession.

As mentioned in the Courts analysis of actual innocence, there were no shortage of highly probative impossibilities in Villegas' confession. Most notably, Villegas (1) named a co-conspirator ("Popeye," the driver of the car) who was incarcerated at the time of the offense; (2) named another co-conspirator ("Droopy") who was confirmed by his probation officer and his monitoring device to be in his home on house arrest at the time; (3) described a "beer run" that never happened; (4) appeared to describe a car and an initial interaction unlike that seen or described by the surviving eyewitnesses; and (5) suggested that there were two series of gunfire, in contrast with the autopsy report, the Gorhams' recollection, and the testimony of Hernandez and Medina.

Where Villegas' first trial counsel carefully presented evidence, argument, and cross-examination pointing out these inconsistencies, Attorney Gates remained mostly silent on these matters. Gates himself now

acknowledges that he "overlooked" or "did not utilize" a substantial amount of "vital, material, and relevant" evidence. He did not call Paula Masters to refute that a "beer run" occurred, and only briefly mentioned during closing that the driver ("Popeye") and passenger ("Droopy") could not have been involved in the crime. Instead, Gates' closing spent more time acknowledging the likely *guilt* of his client by arguing that his gunshots were merely reckless acts, not intentional. Gates also now admits he erroneously stipulated to the autopsy report that overstated the number of bullet wounds and failed to mention that Armando Lazo was not shot in the back, contradicting the suggestion in Villegas' statement that Lazo was shot as he was running away.

Furthermore, all of the correct details that Villegas actually got right in his signed statement were widely publicized in the local media. Unlike Villegas' first trial counsel, however, Gates never elicited from David Rangel or anyone else that Villegas had read the El Paso Times articles and was familiar with the reported details of the shooting. In short, it appears that Villegas was unable to accurately describe anything about the shootings that had not been reported and read by him in the newspaper – but Gates never made this point. In a case where so many of these arguments to challenge the

confession were readily available, defense counsel's failure to pursue them was constitutionally deficient.

The Court further recognizes one area of failure where Gates was particulary deficient. In the trial before the 41st District Court, Gates did bring a Motion for Continuance after less than 59 days of preparation for trial. On trial day, Counsel moved for continuance based on his Motion to Transfer Venue, filed that same day before the Court. The Court immediately overruled Counsel's Motion To Transfer Venue and Counsel withdrew his Motion for Continuance. This Court fails to see any conceivable strategy or plan which would possibly justify Counsel's action to base his Continuance on a summary Motion that was denied by the Court.

One of the most glaring issues this Court has viewed in the case at bar is the amount of time that counsel had between the time of appointment to trial. In the Court's calculation, the amount in time in question was fifty nine (59) days. Even if this Court assumed, *arguendo*, that Counsel had voluminous and specialized experience in the area of capital murder, it is beyond any logic or strategy that a competent attorney could fathom being ready for trial in this amount of time. With capital murder being one of the highest crimes the Texas Penal Code can charge a citizen with, the logistics of investigation, reviewing trial transcripts, interviewing witnesses, securing

experts, as well as trial preparation cannot be accomplished, in this Court's humble opinion, in 59 days. In fact, Gates affidavit specifically stated that his entire preparation for this capital murder trial consisted on reading the trial transcript, Further, Gates also stated that he received these transcripts until a week after his appointment and the transcripts he received were incomplete.

In addition, Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. This was Streep's testimony in the evidentiary writ hearing. Notably, Gates himself now admits he made significant mistakes in Villegas' trial, an opinion shared by Investigator Streep, whom Gates requested a mere six days before the start of trial. In his most recent affidavit, Gates acknowledges that "he missed several key issues" and that the case required "much more preparation" than he gave it. He acknowledged that he had "no plausible reason" for not utilizing exculpating evidence at the second trial and believes that his "trial strategy would have

been different," "more effective," and might have resulted in a "different" outcome for Villegas had he not overlooked this evidence.

This Court also heard testimony from John Williams, who was one of the attorneys for the State of Texas in Applicant's first trial. Mr. Williams, who himself is now an attorney in private practice, testified at the writ hearing that there was no conceivable way that a State's prosecutor could have been ready to prosecute this case in 59 days. This is especially important to this Court as the State of Texas, with its considerable resources and manpower, could not accomplish what the State of Texas claims Mr. Gates could do in the same amount of time. Mr. Williams also testified that he could not have been prepared, if he had been the prosecutor in the second case, in 59 days even though he had intimate knowledge from having prosecuted the first trial. He also testified that even now, as a defense attorney, it is impossible to imagine being adequately prepared for a capital murder trial under any circumstances in 59 days.

Defense counsel has a duty to investigate and explore all avenues of defense. *Wiggins*, 539 U.S. at 521; *Kimmelman*, 477 U.S. at 384; *Ex Parte Wellborn*, 785 S.W.2d at 393; *Freeman v. State*, 167 S.W.3d 114, 119 (Tex. App. 2005); *Briggs*, 187 S.W.3d at 467. The failure to use available impeachment of a key government witness may constitute deficient

performance. *Fahimi-Monzari v. State*, 2010 Tex. App. LEXIS 3902, at *23 (Tex. App – Dallas 5th Dist.); *Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002). Other information Attorney Gates had available but did not utilize would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street (the scene of the Electric Street shooting) at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m. (just minutes after the shooting), but his brother Javier indicated to the police that Rudy was not home at that time.

Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast a further cloud over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position. *See generally Coffey v. State*, 744 S.W.2d 235 (Tex. App. – Houston [1st] 1987), aff'd, 796 S.W.2d 175 (Tex. Crim. App. 1990) (explaining that there is no

error in calling to the stand a witness who invokes an *invalid* Fifth Amendment privilege).

Gates excuses his decision not to investigate or call these witnesses because after speaking with jurors in *other* cases, he had developed a belief that "alibi witnesses were generally ill-considered by juries, their testimony viewed skeptically and, in may [sic] instances, served only to anger them." (Gates First Aff. at 2-3.) Whatever post-trial investigation he may have done in other unrelated cases, however, cannot excuse his pre-trial failure to investigate in this case. The law is clear that an attorney's decisions must be based on "an independent investigation of the *facts and circumstances in the case*" – in other words, he must make a case-specific determination regarding whether a particular client should forgo or pursue testimony from a particular alibi witness based on the particular facts and context of that particular case. *See Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (emphasis added); *see also Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) ("It is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel") (internal citations omitted).

This obligation to make case-specific judgments cannot be satisfied when an attorney simply assumes that certain types of testimony – including

potentially significant alibi testimony – could never be valuable. In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878. Accordingly, the *Schlup*-type claim here depends on the validity of Villegas' constitutional claim of ineffective assistance of counsel. For the reasons stated herein, this Court finds that the substantive ineffective assistance of counsel claim raised by Applicant Villegas is valid and would therefore also recommend relief under *Schlup*.

Finally, other evidence "newly available" to Villegas – that was unavailable, in part, because of the ineffective assistance of his second trial counsel – further demonstrates that a rational trier of fact would acquit Villegas. *See Spencer,* 337 S.W.3d at 878 (considering evidence that is both "newly discovered" and "newly available"). This evidence includes the uncalled alibi witnesses, evidence challenging the voluntariness and reliability of Villegas' confession, and all of the other evidence of Flores' possible guilt outlined above. When considering this evidence with the other newly discovered evidence described, this Court is convinced that justice requires that Villegas' writ be granted.

However, the one of the most disturbing factors in trial counsel's performance was where, in closing argument, Gates argued the Applicant's actions were based on recklessness and not intentional. In this Court's opinion, by this very argument, the proverbial nail was hammered into the Applicant's case to ensure that a conviction was inevitable. This statement in closing argument, by defense counsel and not the State of Texas, along with the controverted and unreliable evidence, all but guaranteed a conviction in this case.

Strickland's prejudice analysis requires this Court to weigh the cumulative impact of all defense counsel's deficiencies. *See Strickland*, 466 U.S. at 695. In this case, Attorney Gates' multiple failures were all mutually reinforcing. His failure to challenge the circumstances of Villegas' questioning and the reliability of the confession left the jury with the impression that the signed statement was credible on its face; his failure to prevent the State from calling Gonzalez or Williams – or from subsequently using their testimony substantively – left the jury with the impression that Villegas' confession was corroborated, especially where he inadequately elicited the circumstances of their statements; and his failure to call alibi witnesses left the jury with the impression that Villegas had no extrinsic evidence with which he could prove his confession false. Taken together,

this perfect storm of errors created prejudice against Villegas and altered the outcome of the trial.

Ramirez v. State 873 S.W.2d 757, 762-63 (Tex. App. 1994), exemplifies the value of examining the counsel's performance in its totality. In *Ramirez*, trial counsel failed to object to the State's use of inadmissible prior convictions. Those convictions were hardly the primary evidence of the defendant's guilt; in fact, there were multiple eyewitnesses to the crime who identified the defendant on the stand. However, defense counsel significantly impeached those eyewitnesses during cross-examination. As a result of this eyewitness impeachment, the *Ramirez* court held that, at the end of trial, the defendant's credibility was the only remaining consideration on which the jury could have based its verdict. Accordingly, trial counsel's failure to object to the State's use of inadmissible prior convictions that certainly undermined the defendant's credibility created sufficient prejudice to satisfy the *Strickland* requirement. *See id.*

Gates' failures go far beyond those in *Ramirez*. Not only did he fail to object to the State's use of inadmissible prior statements, but Gates also failed to impeach the State's witness (as counsel in *Ramirez* had done) or challenge the State's primary evidence – Villegas' confession – on its face. Unquestionably, the aggregate effect of these errors prejudiced Villegas'

trial to an even greater degree than the single error deemed prejudicial in *Ramirez.*

These acknowledgements by Gates all ring true given the disturbingly short amount of time – a mere two months – he had to prepare for this complex capital murder trial. Indeed, Gates' unfamiliarity with the basic facts of the case is apparent in the second trial transcript when he erroneously stipulated that Armando Lazo was shot three times (and once in the back), even though it is undisputed that Lazo was shot just twice in the front.

The extent to which the State exploited Gates' litany of errors and omissions during its closing argument at trial underscores the significant, cumulative prejudicial effect of these errors. The State repeatedly pointed to the hearsay statements of Gonzalez and Williams, the lack of evidence about Villegas' particular vulnerability to confession, and the unsupported alibi defense as reasons to convict Villegas. These arguments would not have been available but for Attorney Gates' ineffectiveness. *See Butler*, 716 S.W.2d at 51 (highlighting the State's closing argument pointing to the lack of corroboration for an alibi as a reason for concluding counsel's ineffectiveness in failing to present further evidence of the alibi was prejudicial).

In short, any review of Gates' representation in its totality compels the conclusion that his errors cumulatively prejudiced this trial, in addition to the conflicting evidence addressed in the actual innocence, as well as the newly discovered evidence, and that Applicant Villegas is therefore entitled to the Writ of Habeas Corpus.

III. CONCLUSION

Whether due to a lack of diligence or the impossibility that any defense counsel could adequately prepare for a capital case of this complexity in just two months, Applicant Villegas received constitutionally deficient assistance that prejudiced his trial. Moreover, this Court believes that the new evidence presented at the writ hearing adequately meets the standard to demonstrate Villegas' actual innocence.

Based on the facts and law presented at the writ hearing and in related filings, this Court concludes that Applicant is illegally confined and restrained in his liberty in violation of the Texas Constitution. This Court hereby strongly recommends that the Texas Court of Criminal Appeals grant his Application for a writ of habeas corpus.

In addition to all of the facts adduced at this hearing, this Court's recommendation of reversal is based on the numerous and inexcusable mistakes and omissions committed by the State of Texas, as well as defense counsel, that have harmed Villegas over the last nineteen years, including, but not limited to, impossible evidence, coerced and unreliable confessions, and a multitude of errors and omissions by defense counsel.

Based on all of the above Findings of Fact and Conclusions of Law, this Court strongly recommends that the Texas Court of Criminal Appeals remand this case for a new trial.

Sam Medrano, Jr.
Judge, 409th District Court

August 16, 2012
Date

IN THE 409th JUDICIAL DISTRICT COURT

EL PASO COUNTY, TEXAS

STATE OF TEXAS	§	
	§	
v.	§	**No. 940D09328**
	§	
DANIEL VILLEGAS	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS

On October 15 and 16, 2014, the Court heard Defendant's Motion to Suppress in this case. The Court heard testimony at the hearing, and admitted into evidence certain testimony from previous proceedings in this case and the proceedings on Defendant's application for writ of habeas corpus.

Based on the evidence presented and the Court's evaluation of the weight of the evidence and credibility of the witnesses, the Court enters these findings of fact and conclusions of law.

FINDINGS OF FACT

1. Shortly after 10:00 p.m., on April 21, 1993, Detective Alfonso Marquez and Detective Earl Arbogast of the El Paso Police Department entered the home of Daniel Villegas, with an arrest warrant obtained approximately forty minutes earlier for Marcos Gonzalez. Gonzalez, an adult, was placed under arrest and read his rights. (Tr. 10/15/14, p. 111-12; WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; 1994 SH, 130, 227).[1]

2. As the detectives were leaving, Daniel Villegas asked them why they were arresting Gonzalez. After learning the identity of Villegas, Detective Marquez placed him under warrantless arrest and read him the same rights. (WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; 1994 SH, 130, 227).

3. Daniel Villegas was sixteen years old at the time.

4. The detectives knew that Villegas was a juvenile when they picked him up at his home. (Tr. 10/15/14, p. 61).

[1] Herein, "Tr." refers to the transcript of this October 2014 suppression hearing. At the hearing, the Court admitted into evidence transcripts of previous proceedings in the case: "WH" refers to the transcript of the writ hearing. "T1" refers to Daniel Villegas's first trial in December 1994. "T2" refers to Daniel Villegas's second trial in August 1995. "1994 SH" refers to the pre-trial suppression hearing in December 1994.

5. Detective Marquez did not have Villegas sign a Miranda warning card at his home. (Tr. 10/15/14, p. 120; WH, 6/21/11, 25, 27; WH, 9/8/11, 161-65).

6. Juvenile Investigative Services is a "juvenile processing office" pursuant to Texas Family Code section 52.05(a). (Tr. 10/15/14, p. 182).

7. Detective Arbogast was not aware of the requirement to take a juvenile in custody to Juvenile Investigate Services without undue delay. (Tr. 10/15/14, p. 132).

8. Upon taking him into custody, Detectives Marquez and Arbogast did not take Villegas directly, and without unnecessary delay, to a juvenile procession office or detention office or facility designated by the juvenile court

9. Villegas and Gonzalez were placed in different police cars. Both police cars then drove past the home of Fernando Lujan, who is known by the nickname "Droopy." The officers specifically pointed this house out to Villegas. (WH, 9/15/11, 29-30; 1994 SH, 12/1/94, 158).

10. While in the car, officers asked Villegas if he knew someone named "Snoopy," and Villegas said he did not. (WH, 9/15/11, 30).

11. Both of the police cars then drove to Northpark Mall. While Villegas and Gonzalez stayed in the police cars, the officers met and spoke to each other. (WH 9/15/11,31; 1994 SH 12/1/94, 152, 223).

12. After this meeting, both Gonzalez and Villegas were driven directly to the El Paso Police Headquarters. During this drive, Villegas repeatedly informed Detective Marquez that he was a juvenile. Detective Marquez accused Villegas of lying about his age. (WH, 9/15/11, 31, 33; 1994 SH, 12/1/94, 224-25).

13. At the police station, Detective Marquez threatened Villegas, telling him that he was "going down for the murders," and "We know you did these shootings and we are taking your ass to jail." (WH, 9/15/11, 31-32).

14. About 10-15 minutes after arriving at Police Headquarters, Detective Marquez confirmed that Villegas was, in fact, just sixteen years old. At that point, Detective Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services. (WH, 9/15/11, 31, 33; 1994 SH, 12/1/94, 224-25).

15. Detective Ortega testified at the suppression hearing that he was called out to Juvenile Investigative Services at 11:00 p.m. (Tr. 10/15/14, p. 165-66). However, he testified at the first trial that he actually arrived at Juvenile Investigative Services at 11:00 p.m. (Tr. 10/15/14, p. 201; T1 p. 377). He wrote at 11:00 p.m. that Villegas had already given a verbal statement implicating himself. (Tr. 10/15/14, p. 193-94; WH, Pet. Ex. 8).

16. Detective Ortega was informed by 11:00 p.m. that Villegas had given an inculpatory statement, and that he wanted to give a written statement. (WH, Pet. Ex. 3). Detective Ortega testified that Detective Marquez gave him this information. (Tr. 10/15/14, p. 205-06, 211). Detective Ortega specifically testified that Daniel Villegas had given his oral statement to a detective before Judge Horkowitz read him his rights at 12:53 a.m. (Tr. 10/15/14 p. 204).

17. Detective Arbogast testified at the suppression hearing that he does not recall Daniel Villegas being read his Miranda rights at all. (Tr. 10/15/14, p. 80). Detective Arbogast testified at the writ hearing that he was not present when Daniel was given his Miranda warnings. (Tr. 10/15/14, p. 125).

18. Villegas signed a juvenile Miranda warning card at 11:15 p.m. (WH, 6/2 1/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

19. It is the practice of the El Paso police officers to have suspects sign Miranda warning cards at the same time they received their Miranda warnings. (Tr. 10/15/14, p. 111).

20. Detective Arbogast recognized that the documents indicate that Daniel Villegas had given a statement implicating himself by 11:00 PM, before receiving his Miranda warnings. (Tr. 10/15/14, p. 124-25).

21. Detective Arbogast recognized that if Villegas had already given a verbal statement implicating himself at 11:00 PM, but did not sign the Miranda warning card until 11:15 PM, "that is a problem." (Tr. 10/15/14, p. 116).

22. Detective Marquez and Detective Arbogast arrived with Villegas at the Juvenile Investigative Services office at approximately 11:30 p.m. (Tr. 10/15/14, p. 107).

23. Detective Marquez recorded the wrong date upon recording Daniel Villegas's arrival at Juvenile Investigative Services. (Tr. 10/15/14, p. 127).

24. At Juvenile Investigative Services, Villegas was placed in a room and handcuffed to a chair by Detective Marquez. (1994 SH, 227; WH, 6/21/11,42-43; WH, 9/15/11 1,33-35; WH, Pet. Ex. 5).

25. Detective Ortega testified that he arrived at Juvenile Investigative Services between 11:45pm and 12:00 pm, and he gave Villegas his Miranda rights. (Tr. 10/15/14, p. 166, 168).

26. According to Detective Ortega, Villegas signed another juvenile Miranda warning card in front of him after he arrived at the office. (Tr. 10/15/14, p. 191; WH, 6/2 1/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

27. Detective Ortega testified that this juvenile Miranda warning card is missing. It is the first and only Miranda warning card to go missing. (Tr. 10/15/14, p. 192, 194).

28. The Court does not find credible the testimony of Detective Ortega that he gave Villegas his Miranda warnings because this Miranda card cannot be produced by the State of Texas. The testimony regarding this matter is also suspect as this is the first time in over twenty years, the initial motion to suppress, two jury trials, and a Section 11.07 writ hearing, that Detective Ortega testified under oath at this second motion to suppress hearing, that this Miranda warning card is missing.

29. Villegas was questioned by Detective Marquez while at Juvenile Investigative Services, and Villegas testified to the following:

    a. Villegas remained handcuffed to a chair while he was questioned for approximately one hour.

    b. Detective Marquez repeatedly accused Villegas of committing the Electric Street shooting, telling him that Rodney Williams had implicated him.

    c. Detective Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and fucked by a bunch of fat faggots."

    d. Detective Marquez also threatened to "kick his ass" and to take him to the desert and beat him if he did not admit to the shooting.

    e. When Villegas maintained his innocence, Detective Marquez slapped him. Villegas had never been interrogated before and was "terrified out of his mind." (WH, 9/15/11, 35-36; T1, 12/12/94, 813-18).

30. Villegas was next handcuffed and walked over to the Juvenile Probation Department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to give a confession. (WH, 6/21/11, 212; SM, 11/30/04, 20; WH, Pet. Ex. 6).

31. At some unknown time before between 12:26 and 12:53 a.m., Detective Marquez took Daniel Villegas back to Juvenile Investigative Services. It was Detective Marquez's responsibility to sign Daniel Villegas in when he returned and record the time, but he failed to do so.

32. Villegas was next taken before Magistrate Carl Horkowitz, who was required to warn him of his rights prior to any interrogation.

33. Prior to this meeting with Magistrate Horkowitz, Villegas testified that Detective Marquez warned Villegas that if he did not agree to give a statement, he would beat him and put him in jail. Specifically, Villegas testified that Detective Marquez threatened: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, motherfucker. I am going to take you to the desert and beat your ass." (WH, 6/21/11, 56-57; WH, 9/15/11, 39).

34. At 12:53 a.m., Villegas told Magistrate Horkowitz that he would give a statement, but testified that he did so only because he was "mentally paralyzed" by Detective Marquez's continual threats. (WH 9/15/11, 38-39).

35. Villegas was then driven back to Juvenile Investigative Services. There is no documented evidence, once again, that Detective Marquez signed Daniel Villegas in and recorded the time of his arrival. (Tr. 10/15/14 p. 142-43).

36. Villegas testified that he was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned once again by Detective Marquez. After being told by Det. Marquez that Williams had already implicated him, Villegas testified he told Detective Marquez the following while Detective Marquez typed the statement: On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun. Williams alone left with the black males, telling Villegas that he was going to do "something crazy." Williams returned later and told Villegas that he had killed Lazo and England. (WH, 9/15/11, 40).

37. Villegas testified that after he finished this statement, Detective Marquez then took the paper from the typewriter, crumpled it up, and slapped Villegas. Detective Marquez then threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (WH, 9/15/11, 40-41).

38. Detective Marquez then waived Williams' statement at Villegas and told him that Williams had named "Snoopy" and Marcos Gonzalez as accomplices. Villegas told Detective Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (WH, 9/15/11, 44).

39. Detective Marquez then left the room, but returned shortly thereafter to tell Villegas that Marcos Gonzalez had also implicated Villegas as the shooter. (WH, 9/15/11, 46).

40. While Detective Marquez was interrogating Daniel Villegas, Detective Graves was simultaneously interrogating Marcos Gonzalez. Marcos Gonzalez gave a first statement. Detective Graves and Detective Marquez communicated with each other about the statements. After Detective Graves consulted with Detective Marquez about the information provided by Daniel Villegas, Detective Graves confronted Marcos Gonzalez with this information. Marcos Gonzalez then changed his statement to conform to the information that Detective Marquez gave Detective Graves.

41. Villegas testified that Detective Marquez's physical and psychological coercion, including threats of incarceration and physical harm, left Villegas "mentally drained" and "exhausted" to such an extent that he finally agreed to falsely implicate himself as the shooter. (WH, 9/15/11, 44-45, 49).

42. Daniel Villegas agreed to sign a one-page statement prepared by Detective Marquez. (WH, St. Ex. 1).

43. Daniel Villegas' signed statement contains false and factually impossible evidence when compared to the physical evidence and testimony. (Tr. 10/15/14, p. 142-50; WH, 9/8/11, 130-33, 153-54, 195, 205-06, 212-15; WH, 9/15/11, 59; WH, St. Ex. 1, Pet. Ex. 24, 26, 29, 51, 56, 61; T2, 8/24/95, 167-68).

44. Detective Arbogast testified that he is not aware of any evidence corroborating any part of Daniel Villegas's statement. (Tr. 10/15/14, p. 152).

45. Detective Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. Villegas was then taken back to Magistrate Horkowitz, where, after being given Miranda warnings, he signed the statement at 2:40 a.m. (WH, St. Ex. 1).

46. Detective Arbogast is unable to explain what the detectives did with Daniel Villegas for the two-hour span between when he signed his statement, and 4:20 a.m. when he was taken to the Juvenile Probation Department. (Tr. 10/15/14, p. 144).

47. As soon as he was away from Detective Marquez, Daniel Villegas recanted his statement to Monica Sotelo, a juvenile probation officer. Officer Sotelo noted that Villegas was shaking and looked scared. He informed Officer Sotelo that "he didn't do it," and that he was not in the area where the crime occurred that night. He told her that he only confessed because "the cops kept harassing him." He told her that he was "tired and [he] wanted to go back to sleep, so [he] told them what they wanted to hear." (Tr. St. Ex. 1; WH, Pet. Ex. 42).

48. At the 2014 suppression hearing, Officer Sotelo testified that she did not recall Daniel Villegas specifically, but was testifying based on her review of her notes. She testified that if Daniel Villegas had informed her of the specific details of Detective Marquez's threats, she would have put those details in her notes. However, she admitted that she did not ask Daniel Villegas those specific questions. Officer Sotelo further testified that Villegas barely realized at the time that the confessions and statements made him out to be the shooter. She reaffirmed that Daniel Villegas appeared scared, and reported to her that he was not guilty, that he was being harassed, that he was being threatened, and that he was only confessed because he was being harassed and was tired and wanted to go to sleep, so he told them what they wanted to hear. (Tr. 10/15/14, 24, 31-32, 36-39).

49. Priciliano Villegas, Daniel Villegas' adopted father, testified that Daniel Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. He described Villegas as impressionable, easy to trick, someone who thought more like a child than an adult, and tells people what they want to hear. He also testified that Daniel Villegas was "hyper" and prone to boasting. (T1, 12/9/94, 647-49, 651-52, 655).

50. Patricia Cate, who is the aunt of Villegas and had known him his whole life, testified that he was prone to boasting and exaggeration. (T1, 12/9/94, 701, 704-06).

51. Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, testified that Villegas likely had a learning disability, attention deficit disorder, emotional problems, and possible mild mental retardation, all of which could make him impulsive and a poor decision-maker. Dr. Rodriguez-Chevres also testified that there is a "strong possibility" that these traits could make Villegas easily influenced by a police interrogation. (T1, 12/12/94, 742-50; WH, Pet. Ex. 72).

52. Jesus Lechuga, who was the bond officer for Villegas prior to trial and the individual to whom Villegas reported for 12-18 months testified that Villegas was a very poor reader with very poor comprehension; indeed, Villegas did not understand that a "home" was the same thing as a "house." (WH, 6/22/11, 167, 169-71).

53. Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (WH, 6/22/11, 122).

54. On April 12, 1993, Jesse Hernandez, a surviving victim, was brought back to the police station by Detective Marquez for further questioning, where Hernandez testified that the following occurred: (WH, 6/22/11, 54-55).

    a. Detective Marquez asked Hernandez to write out a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told him to "just cut the bullshit," and threw the statement back at Hernandez.

    b. Detective Marquez accused Hernandez of killing his friends and lied to him by telling Hernandez that Juan Medina had already implicated him.

    c. Detective Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty.

    d. Hernandez did not confess to the crime. However, he testified that he was close to confessing to the killing of his friends based on Detective Marquez's interrogation.

55. On April 15, 1993, based on a tip, Detective Marquez participated in the arrest, transport from New Mexico to El Paso, and subsequent questioning of fifteen-year-old Michael Johnston. Michael Johnston testified as follows:

    a. Detectives Marquez and Graves interrogated Michael Johnston for eight hours from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993.

    b. Johnston was handcuffed during the entire eight hours and was unaccompanied by his parents.

c. Detective Marquez accused Johnston of shooting Lazo and England and lied to him that Johnston's friend had implicated him.

d. Detective Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself.

e. Detective Marquez further threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess.

f. Johnston confessed to shooting Armando Lazo and Robert England.

g. Johnston was never charged with this offense. Detective Marquez later admitted that Johnston's confession was false. (T1, 12/8/94, 312, 317; T1, 12/9/94, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

56. On April 21, 1993, the El Paso Police Department contacted Patricia Cate, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint that had been filed against him and threatening her with obstruction of justice if she did not cooperate. David Rangel is Daniel Villegas' cousin. Rangel was subsequently picked up by investigating detectives and questioned at the police station by Detectives Marquez and Lozano. David Rangel testified as follows:

a. David Rangel was never questioned about a telephone harassment complaint. The sole topic discussed was the shooting on Electric Street.

b. Detective Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting.

c. Detective Marquez threatened Rangel with life in prison if he did not confess and warned him that he was a "pretty white boy with green eyes" who could expect to be "fucked" in prison.

d. Rangel wrote a statement documenting this phone call with Villegas and Gonzalez, wherein he noted that Villegas had admitting shooting at the victims with a sawed-off shotgun.

e. Detective Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun.

f. Detective Marquez ordered Rangel to sign another statement that purported to document the phone conversation but that did not mention the type of gun used. Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just [wanting] to get out of there." (T1, 12/8/94, 146; T1, 12/9/94, 696;

WH, 6/22/11, 113, 118-36).

57. The State of Texas did not call Detective Marquez to testify at the suppression hearing.

58. The previous testimony of Detective Marquez, which was admitted into evidence at the suppression hearing, is not credible. This Court reaches this finding based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others, such as:

a. Detective Marquez's testimony that Villegas had not been questioned prior to the 12:26 a.m. intake at the juvenile probation department is contradicted by the intake log stating that he had already agreed to "give a confession" by this time. (WH, Pet. Ex. 6).

b. Detective Marquez's testimony that Villegas had not been questioned prior to the 12:26 a.m. at the juvenile probation department is contradicted by Detective Ortega's testimony that he had been informed by another detective by 11:00 pm. that Villegas had given an inculpatory statement, and that he wanted to give a written statement. Detective Ortega testified at the suppression hearing that Detective Marquez gave him this information. (WH, Pet. Ex. 3; Tr. 10/15/14, p. 211).

c. Testimony from other law enforcement officers contradicted Detective Marquez's testimony:

i. Denying that he stopped at Northpark Mall or going to Police Headquarters,

ii. That he ordered other detectives to retrieve what may have been a tape exculpatory to Villegas, and

iii. That he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez.

d. Testimony from Detective Marquez during the writ hearing that on a previous occasion, he wore a "smock" commonly worn by medical personnel, during the interrogation of a criminal suspect. He further testified that the smock was not used for deception purposes. This Court finds no conceivable way that the wearing of a smock commonly worn by medical personnel, was not intended to deceive an accused into believing that he was talking to medical personnel and not law enforcement.

59. Michael Gibson and Bruce Weathers, both practicing attorneys in El Paso, testified that Detective Marquez has a reputation for untruthfulness. Gibson, a former First Assistant Chief Felony Prosecutor and Director of the Organized Crime Unit in El Paso, actually

twice presented a perjury indictment to the grand jury against Marquez. (T1, 12/9/1994, 550-80; T1, 12/12/1994, 786).

60. Michael Johnston, as well as his mother Barbara Hoover, testified that Detective Marquez used illegal interrogation tactics leading to Johnston's own false confession to the Electric Street murders. (TI, 12/ 9/1994, 587, 589).

61. Detective Marquez himself was recalled and testified that he had been the subject of a number of Internal Affairs investigations. He also testified that there have been roughly thirty citizen complaints against him as of 1994. (T1, 12/9/94, 678-80)

62. Daniel Villegas testified to the threats made to him by Detective Marquez during the interrogation, and the other surrounding circumstances of his interrogation. (TI, 12/12/94, 813-23).

63. Detective Marquez testified in the second trial of Daniel Villegas that he could get a confession at any point if "he really wanted to." (WH, 9/8/11, 122-23).

64. For all of these reasons, the Court finds that Detective Marquez's prior testimony in connection with this matter is not credible, and gives Detective Marquez's testimony little to no weight.

65. The State called Detectives Arbogast, Ortega, and Graves to testify at the 2014 suppression hearing.

66. Each of the detectives called to testify at the suppression hearing has testified that there were times when Daniel Villegas was with Detective Marquez and out of their presence. Specifically,

    a. Detective Arbogast was not present with Detective Marquez the entire time he was with Daniel Villegas. (Tr. 10/15/14, p. 106).

    b. Detective Arbogast was not with Detective Marquez and Daniel Villegas when Villegas's statement was taken. (Tr. 10/15/14, p. 72).

    c. Detective Arbogast was not with Detective Marquez and Daniel Villegas for approximately an hour after he arrived at Juvenile Investigative Services, and did not know what happened during that period of time. (Tr. 10/15/14, p. 107-08, 126-27).

    d. Detective Arbogast did not know what Detective Marquez did outside of his presnce. (Tr. 10/15/14, p. 106, 127, 163).

    e. Detective Arbogast testified that he could not say whether it was true that Detective Marquez threatened or beat Daniel Villegas, told him he was going to be raped, or threatened to take Villegas to the county jail and pull the switch

himself. (Tr. 10/15/14, p. 107).

f. Detective Arbogast testified that he was not aware of all of the tactics Detective Marquez used to try to get witnesses to give statements, such as wearing a medical smock. (Tr. 10/15/14, p. 162).

g. Detective Ortega testified that he did not recall whether he arrived at Juvenile Investigative Services before or after Detective Marquez and Daniel Villegas. (Tr. 10/15/14, p. 167-68).

h. Detective Ortega testified that he does not know what was going on with Villegas before he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 204-05).

i. Detective Ortega also testified that he did not know what was going on while Villegas was at Juvenile Investigative Services for the hour between 11:30 and 12:26. (Tr. 10/15/14, p. 204-05).

h. Detective Ortega testified that he may have taken a bathroom break while Detective Marquez was interrogating Daniel Villegas. (Tr. 10/15/14, p. 176).

i. Detective Ortega likewise testified only that Detective Marquez's acts towards Daniel Villegas did not occur in his presence, not that they did not occur. (Tr. 10/15/14, p. 190). He testified that he did not know what occurred between Detective Marquez and Daniel Villegas when he was not around. (Tr. 10/15/14, p. 206).

j. Detective Graves interrogated Marcos Gonzalez separately in a different location while Detective Marquez was interrogating Daniel Villegas. (Tr. 10/15/14, p. 243-44).

67. The detectives who testified at the suppression hearing also admitted to not recalling the details of this particular investigation:

a. Detective Arbogast admitted that there were a lot of details he couldn't remember. (Tr. 10/15/14, p. 105).

b. Detective Arbogast does not remember the conversation held by the officers during the stop at Northpark mall. (Tr. 10/15/14, p. 131-32).

c. Detective Arbogast does not remember much of what happened during the two-hour span between leaving Judge Horkowitz and the arrival at Juvenile Probation Department. (Tr. 10/15/14, p. 144).

d. Detective Arbogast admitted that his memory doesn't usually get better with time (Tr. 10/15/14, p. 107).

e. Detective Ortega testified that he did not recall whether he arrived at Juvenile Investigative Services before or after Detective Marquez and Daniel Villegas. (Tr. 10/15/14, p. 167-68).

f. Detective Ortega testified that he does not have independent recollection of what occurred in this investigation. (Tr. 10/15/14, p. 198).

g. Detective Ortega also testified that his own memory has not gotten better with time. (Tr. 10/15/14, p. 198).

h. Detective Graves testified that he does not recall what was said during the stop at Northpark mall. (Tr. 10/15/14, p. 230).

i. Detective Graves testified that he does not recall which detective he was communicating with while he was interrogating Marcos Gonzalez. (Tr. 10/15/14, p. 243). However, in the first trial he remembered that it was Detective Marquez. (T1, p. 494).

j. Detective Graves testified that he does not recall the meaning of the annotations on complaint affidavits prepared on the computer system used in 1993. (Tr. 10/15/14, p. 251).

k. Detective Graves testified that he does not recall whether he went to the magistrate to obtain the warrant for Marcos Gonzalez. (Tr. 10/15/14, p. 253).

l. Detective Graves testified that he has "worked a lot of murders in my career and it is hard to remember every single detail from every single one." (Tr. 10/15/14, p. 253).

68. The testimony of the detectives at the suppression hearing contradicted their previous statements and the testimony of the other detectives in several respects:

a. Detective Arbogast first testified at the suppression hearing that he arrived at Villegas's home at 10:45; but when he previously spoke with Villegas's counsel, he did not have independent recollection of the time and not recall whether it was 10:00 or 10:45; and he subsequently conceded that he did not actually recall what time they arrived. (Tr. 10/15/14, p. 60, 107, 115).

b. Detective Arbogast first testified at the suppression hearing that the detectives did not take Villegas to the police station before taking him to Juvenile Investigative Services; but he previously stated that he did not remember. (Tr. 10/15/14, p. 66, 86, 121-22).

c. Detective Arbogast has testified inconsistently regarding whether he was with Detective Marquez on the way back to Juvenile Investigative Services after appearing before Judge Horkowitz. (Tr. 10/15/14, p. 128-30; WH 6/21/11, 56).

d. Detective Ortega has testified inconsistently about the time he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 192-93, 200-01).

e. Detective Ortega changed his original testimony. He first testified unequivocally that he knew the defendant had given a statement implicating himself because Detective Marquez told him. (Tr. 10/15/14, p. 211). When the State suggested that he was assuming that, he testified that he was assuming. (Tr. 10/15/14, p. 211). He admitted that he changed his answer under oath within a matter of minutes. (Tr. 10/15/14, p. 216).

f. Detective Ortega testified that, to the best of his recollection, he was called out at 11:00 pm to help with the confession process, and arrived at Juvenile Investigative Services between 11:45 pm and 12:00 am, and that he was not with Detective Marquez prior to the time he arrived at Juvenile Investigative Services. (Tr. 10/15/14, p. 165-66, 181). He specifically testified that he did not assist Detective Marquez with the arrest of Daniel Villegas at his home. (Tr. 10/15/14, p. 202-03). However, Detective Graves testimony contradicts Detective Ortega as he testified that Detective Ortega was at Daniel Villegas's home at the time of the arrest. (Tr. 10/15/14, p. 229).

CONCLUSIONS OF LAW

1. At the relevant date, Texas Family Code § 52.02 stated as follows:

   (a) A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025 of this code, shall do one of the following:

      (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;

      (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;

      (3) bring the child to a detention facility designated by the juvenile court;

      (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or

      (5) dispose of the case under Section 52.03 of this code.

   Act of May 26, 1991, 72nd Leg., R.S., ch. 495, § 1, Tex. Gen. Laws 1738. *See also Le v. State*, 993 S.W.2d 650, 655 (Tex.Crim.App. 1999) (explaining that this version of the statute was in effect at the time of the statements at issue).

2. The Texas Family Code restricts the actions of law enforcement officers while a juvenile is in custody. TEX.FAM.CODE § 52.02.

3. If a juvenile's statement is illegally obtained under any of the applicable provisions of the Texas Family Code, the statement is inadmissible against him in a criminal trial, following transfer for criminal proceedings treating him as an adult. *Le v. State*, 993 S.W.2d 650, 656 (Tex.Crim.App. 1999).

4. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the State has not carried its burden to prove that the statements of Daniel Villegas on April 21 and 22, 1993, were voluntary.

5. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the State has not carried its burden to prove that Daniel Villegas knowingly, intelligently and voluntarily waived his rights not to make a statement prior to and during the making of any statements he gave on April 21 and 22, 1993.

6. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the statements of Daniel Villegas on April 21 and 22, 1993 were obtained in violation of his right to due process, because the statements were obtained by coercive conduct by police officers of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by Daniel Villegas.

7. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the El Paso Police Department detectives failed to comply with Texas Family Code section 52.02 while Daniel Villegas was in custody.

8. Based on the Court's findings of facts stated above and the Court's evaluation of the weight of the evidence presented and the credibility of the witnesses, the statements of Daniel Villegas on April 21 and 22, 1993 were obtained in violation of Texas Family Code section 52.02, and this statutory violation caused Daniel Villegas to give the statements.

9. The Court finds that the statements made by Daniel Villages on April 21 and 22, 1993 would not have been made but for the officers' unnecessary delay in bringing Daniel Villegas to Juvenile Investigative Services.

10. The Court finds that Detectives Marquez and Arbogast went to Daniel Villegas's home at 10:00 p.m., where Villegas was picked up. Marquez and Arbogast arrived with Villegas at Juvenile Investigative Services at 11:30 p.m. The transport time from Daniel Villegas's home to Juvenile Investigative Services is 15 minutes. Daniel Villegas was taken Northpark mall, looking for Droopy and Popeye's homes, as well as debriefing by detectives, then Daniel Villegas was transported to El Paso Police Department headquarters, not a juvenile processing office, before he was finally taken to Juvenile Investigative Services. The Court finds there was unnecessary delay in transporting Daniel Villegas to Juvenile Investigative Services.

11. The Court finds, based on the evidence, that the unnecessary delay in bringing Daniel Villegas to Juvenile Investigative Services, gave Detective Marquez the time and opportunity to threaten, coerce, and intimidate Daniel Villegas, a sixteen-year-old child. During this period of time, Detective Marquez accused Daniel Villegas of lying and engaged in a pattern of coercion and intimidation that continued until Villegas signed a written statement. The Court finds, based on the evidence, that the failure to comply with Family Code §52.02 was a cause of Daniel Villegas' involuntary statement on April 21 and 22, 1993. *See Comer v. State*, 776 S.W.2d 196-96 (Tex.Crim.App. 1989).

12. The statements of Daniel Villegas taken on April 21 and 22, 1993 must be suppressed for the following reasons:

a. The State of Texas has failed to meet its burden to show that the statement was voluntary;

b. The State of Texas has failed to meet its burden to show that Daniel Villegas knowingly, intelligently, and voluntarily waived his right to not make a statement;

c. El Paso Police Detective Al Marquez obtained Daniel Villegas' statement in violation of his constitutional rights to Due Process, guaranteed under the United States Constitution and the Texas Constitution and Texas Family Code §52.02.; and

d. The Court finds that the testimony of El Paso Police Detectives Al Marquez and Carlos Ortega were not credible to the issues of voluntariness of the Accused statement and compliance with the United States Constitution, the Texas Constitution and Texas Family Code §52.02.

13. IT IS SO ORDERED, ADJUDGED, AND DECREED by this Court that any and all statements made by Daniel Villegas on April 21 and 22, 1993, are hereby SUPPRESSED, and shall not be admitted into evidence at the trial of this matter.

SIGNED THIS 3rd day of November, 2014.

Hon. Sam Medrano, Judge
409th Judicial District Court

APPENDIX 3

CAUSE NO. 940D09328

THE STATE OF TEXAS	§	
V.	§	**IN THE 409th DISTRICT COURT**
DANIEL VILLEGAS	§	**EL PASO COUNTY, TEXAS**

STATE'S NOTICE OF APPEAL

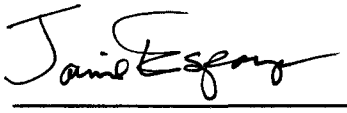
COMES NOW, the State of Texas, in the above styled and numbered cause, by and through the District Attorney of the 34th Judicial District, and files this Notice of Appeal, pursuant to Rule 25.2 of the Texas Rules of Appellate Procedure, as follows:

I.

The State of Texas hereby gives written notice of appeal to the Court of Appeals for the Eighth District of Texas at El Paso, from the pretrial order, signed on January 5, 2015, excluding the State's evidence as irrelevant and inadmissible, specifically, audio recordings of the defendant's jail and prison telephone conversations, which contain incriminating evidence. The State is entitled to appeal from the order of the trial court. *See* TEX. CRIM. PROC. CODE art. 44.01(a)(5) (article setting out the State's entitlement to appeal an order granting a motion to suppress evidence); *see also State v. Medrano*, 67 S.W.3d 892, 903

(Tex.Crim.App. 2002) (holding that the State may appeal an adverse pretrial ruling that seeks to exclude evidence as inadmissible rather than to suppress evidence as illegally obtained). The State certifies that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case.

Respectfully submitted,



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ATTORNEY FOR THE STATE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing notice of appeal was mailed by regular mail, and an electronic copy was emailed, on January 5, 2014, to the defendant's attorney: Joe A. Spencer, Jr., Law Office of Joe Aureliano Spencer, Jr., 1009 Montana Ave., El Paso, Texas 79902; by email: joe@joespencerlaw.com.

JAIME ESPARZA